CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 346.

THE UNITED STATES, APPELLANT,

vs.

THE CHEROKEE NATION.

No. 347.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE CHEROKEE NATION.

No. 348.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED JULY 19, 1905.

(19848, 19849, 19850)

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INDEX.

1 In the Court of Claims of the United States.

THE CHEROKEE NATION, CLAIMANT,
vs.
THE UNITED STATES, DEFENDANT. } No. 23199.

I.—Petition, filed February 20, 1903.

To the honorable the Chief Justice and Associate Justices of the United States Court of Claims:

Your petitioner, the Cherokee Nation, in its own behalf and in behalf of the individuals who are members and citizens of said nation, and interested in the subject-matter of this petition, respectfully represents and shows to this honorable court as follows:

First. That this petition is filed and the jurisdiction of this
2 court is invoked under and by virtue of certain provisions of an act of Congress approved the first day of July, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites, and for other purposes," which said act was in accordance with sections 74 and 75 thereof ratified by the Cherokee Nation at a popular election held August 7th, 1902, and which said act is printed in the session laws of the first session of the 57th Congress, pages 716 to 727.

These provisions, contained in section 68 of said act, are as follows:

"SECTION 68. Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe or any band thereof, arising under treaty stipulations, may have against the United States, which said suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe, or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority by proper orders and process to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination
of the matter in controversy, and any such suit shall on
3 motion of either party be advanced on the docket of either of said courts and be determined at the earliest practicable time."

By section 1 of said act it is further provided, as follows:

"SEC. 1. The words 'Nation' and 'Tribe' shall each be held to refer to the Cherokee Nation or Tribe of Indians in Indian Territory."

Second. The Cherokee Nation, claimant herein, is, and since the act of union between the Eastern Cherokees and Western Cherokees, on July 12th, 1838, has been, a body politic, recognized and dealt with as

such by the United States in all matters affecting the rights, interests, and property of the Cherokee Nation or Tribe, or the members thereof; and is, as such, the "Cherokee Tribe" mentioned in Section 68 of the act of Congress aforesaid, and authorized thereby to bring this proceeding.

Third. At the time of the making of the treaty between the Cherokee Nation and the United States for the cession by the Cherokee Nation of what is known as the "Cherokee Outlet," the said nation, claimant herein, claimed and insisted, and for many years prior thereto had claimed and insisted, that there was due to said nation under the stipulations of various treaties entered into between the United States and said nation certain sums of money, for a true and just account of which and the payment whereof the said Cherokee Nation had been continually requesting and petitioning the United States by memorials to
4 Congress and otherwise. The statement of such an account, and the payment of all moneys due to said nation under the treaty stipulations aforesaid, was demanded by said Cherokee Nation as a condition precedent to, and a consideration for, the cession by it to the United States of said tract of land known as the "Cherokee Outlet."

Fourth. The United States acceded to this demand, and on the 19th day of December, 1891, a treaty was negotiated between the United States and the Cherokee Nation, claimant herein, by duly authorized commissioners of both the parties thereto, duly ratified on the part of the Cherokee Nation, on the 4th day of January, 1892, and on the part of the United States, by act of Congress of March 3rd, 1893 (United States Statutes at Large, Vol. 27, page 640), by the terms of which said treaty, in consideration of the cession and relinquishment by the said Cherokee Nation to the United States of a tract of land in the Indian Territory, containing 8,144,628.91 acres, known as the "Cherokee Outlet," the United States, among other things, expressly undertook and agreed to render to said Cherokee Nation a complete account of moneys due said nation under certain treaties therein specifically mentioned, and to pay such moneys to said nation, which said undertaking and agreement, as contained in the fourth subdivision of the second article of said treaty, is as follows:

"The United States shall, without delay, render to the Cherokee
5 Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835–6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect; and upon such accounting should the Cherokee Nation by its national council conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States, by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting. And the Congress of the United States shall at its next session after such case

shall be finally decided and certified to Congress, according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting."

In compliance with its obligations under said agreement the Cherokee Nation has ceded, relinquished, and conveyed to the United States the tract of land therein described, known as the "Cherokee Outlet."

The provisions of which said treaty, as set forth in the act of
6 Congress ratifying the same (United States Statutes at Large, volume 27, page 640), claimant hereby, by reference thereto, makes a part of this petition.

Fifth. In pursuance of the terms of said treaty, by the third section of the act of Congress ratifying the same, there was appropriated the sum of $5,000 to employ experts to properly render a complete account to the Cherokee Nation of moneys due said nation as required by the fourth subdivision of article 2 of said treaty; and under this provision Messrs. James A. Slade and Joseph T. Bender were employed and appointed as the agents of the United States Government to render to the Cherokee Nation the account required by said fourth subdivision of article 2 of said treaty.

Sixth. Thereafter, under date of April 28th, 1894, the said James A. Slade and Joseph T. Bender rendered "a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect," in accordance with subdivision 4, article 2 of said treaty, ratified March 3, 1893, aforesaid. The amounts found and stated by said accounting to be due from the *from the* United States to the Cherokee Nation are as follows:

"Under the treaty of 1819:	
Value of three tracts of land, containing 1,700 acres, at $1.25 per acre, to be added to the principal of the school fund	$2,125.00
With interest from February 27, 1849, to date of payment.	
7 Under treaty of 1835:	
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund	1,111,284.70
With interest from June 12, 1838, to date of payment.	
Under the treaty of 1866:	
Amount received by receiver of public moneys at Independence, Kansas, never credited to Cherokee Nation	432.28
With interest from January 1st, 1874, to date of payment.	
Under act of Congress, March 3, 1893:	
Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund	20,406.25
With interest from July 1st, 1893, to date of restoration of the principal of the Cherokee funds held in trust in lieu of investments."	

Seventh. The account thus stated was, in accordance with the fourth subdivision of article 2 of said treaty of March 3, 1833, rendered to the Cherokee Nation through R. F. Wyly, the agent duly appointed for that

purpose by authority of the national council of said nation, and was duly accepted by the act of the said national council in the manner and form provided in said treaty; and no suit has been brought by the Cherokee Nation against the United States in the Court of Claims charging that such account was incorrect or unjust.

Eighth. The principal chief of the Cherokee Nation, at the direction of the national council, at once notified the Secretary of the Interior and the Commissioner of Indian Affairs of the acceptance by the national council of the Cherokee Nation of said accounting, and requested the Secretary of the Interior to so notify the Congress of the United
8 States and ask for an immediate appropriation of the amount so stated to be due, in accordance with subdivision 4, article 2, of said treaty, ratified March 3, 1893.

On the 7th day of January, 1895, Hon. Hoke Smith, then Secretary of the Interior, in compliance with the provisions of said subdivision 4 of article 2 of said treaty or agreement, transmitted to the Speaker of the House of Representatives a certified copy of the report of said Slade and Bender, together with a certified copy of the act of the Cherokee national council accepting such accounting.

Which said letter of the Secretary of the Interior, the report and accounting of Messrs. Slade and Bender, and the certified copy of the act of the Cherokee national council accepting such accounting, are set forth in House Executive Document No. 182, 53rd Congress, 3rd session, a copy of which, marked "Exhibit A," is hereby filed and made part hereof.

At the time of the transmission of said accounting to the Speaker of the House of Representatives the Congress of the United States was in session, but Congress, both at that session and at the session immediately following, failed and refused to make an appropriation for the payment of the sum of money found upon such accounting to be due from the United States to the Cherokee Nation and withheld by the United States in violation of the express agreement and obligation of the United States so to do contained in said fourth division of article 2 of said treaty,
9 ratified by act of Congress approved March 3rd, 1893, in consideration of which said agreement and obligation of the United States the Cherokee Nation ceded all that tract of land described in said agreement and known as the "Cherokee Outlet."

Ninth. None of the amounts above stated to be due by the United States to the Cherokee Nation, or any part of them, has ever been paid, nor has Congress to the date of filing this suit made any appropriation of money for the payment of the same.

PRAYER.

Wherefore all of the premises aforesaid considered, the Cherokee Nation prays as follows:

1. That the court adjudge and decree that there is due from the defendant to the claimant herein, and that the defendant pay to claimant the following sums of money found to be due and promised to be paid by the United States by the stipulations of the treaty ratified March 3rd, 1893, aforesaid:

$2,125.00, with interest thereon at the rate of 5 per cent per annum from February 27th, 1819, until paid.

$1,111,284.70, with interest thereon at the rate of 5 per cent per annum from June 12th, 1838, until paid.

$432.28, with interest thereon at the rate of 5 per cent per annum from January 1st, 1874, until paid.

10 2. That the court adjudge and decree that the defendant shall restore to the Cherokee funds held in trust in lieu of investments the sum of $20,106.25, together with interest thereon at the rate of 5 per cent from July 1st, 1893, to the date of the restoration of said principal sum.

3. For such other and further relief as to the court shall seem meet and proper.

THE CHEROKEE NATION,
By THOMAS M. BUFFINGTON,
Principal Chief of the Cherokee Nation.

EDGAR SMITH,
Attorney of Record, Vinita, Indian Territory.
FINKELNBURG, NAGEL & KIBBY,
Of Counsel.

11 INDIAN TERRITORY,
Northern District, ss:

Thomas M. Buffington, of Vinita, Indian Territory, being duly sworn, on his oath states that he is the principal chief of the Cherokee Nation; that he has read the foregoing petition of said Cherokee Nation, claimant, and that the matters and facts therein set forth are true to the best of his knowledge and belief.

THOMAS M. BUFFINGTON.

Subscribed and sworn to before me this 14th day of February, A. D. 1903.

[SEAL.] G. P. FOGLE, *Notary Public.*

My commission expires Oct. 31, 1905.

Exhibit "A," as described herein, was filed with this petition.

12 THE EASTERN CHEROKEES } No. 23212.
vs.
THE UNITED STATES. }

II.—Original petition, filed March 10, 1903.

Your petitioners represent as follows, viz:

1. That they number about 3,000 persons, more or less, all Eastern Cherokees, residing for the most part in Cherokee, Graham, Swain, and Macon Counties, North Carolina, some in north Georgia and Eastern Tennessee, together with about 800 persons, portions of their various families, gone west, nearly all of whom have been recognized as citizens and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina.

2. This suit is brought under authority contained on pages 16 and 17 of the Indian appropriation bill, Public No. 144, of the 2d session of

the 57th Congress, passed March 3, 1903, a copy of which is herewith filed, marked Exhibit "A," and the amendment to the Cherokee agreement, Exhibit "B," otherwise known as the Cherokee allotment, Public
241, pages 11, 12, and 13, of the 1st session of the 57th Congress,
13 passed July 1, 1902, with reference to House Executive Doc. 309, of the 2d session of the 57th Congress, Exhibit "C," copies of these acts also filed, and containing the provision that not only all Eastern Cherokees, but that the Cherokee Nation shall be made party to any suit filed thereunder, and requiring that in causes of this kind "per capita payments shall be made directly to each individual * * * that jurisdiction be conferred on the Court of Claims to examine, consider, and adjudicate, with a right to appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations may have against the United States upon which suit shall be instituted." This is one of the class of cases named.

3. Wherefore we request the honorable court that not only the rest of the Eastern Cherokees, but that the Cherokee Nation, be made parties to this suit, as required by these several acts herein set forth.

4. That the object of this suit by the claimants herein is to recover from the United States their pro rata share of that portion of improperly
taken by the United States from the five million fund on account
14 of removal of E. Cherokees, as found by the expert accountants, Messrs. Slade and Bender, April 28, 1894, the said five million fund being an interest-bearing fund in the hands of the United States, as trustee, and representing the money paid by the Government to the Eastern Cherokees for the sale of their lands in North Carolina, Georgia, and Tennessee, or east of the Mississippi River, as set forth in article 1st of the treaty of New Echota, in north Georgia, on March 14, 1835, and articles 2 and 3 of the supplemental treaty, proclaimed May 23, 1836, this sum so misapplied amounting, in accordance with said accounting, to one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70), with interest at 5% per annum from the date of said wrongful taking, June 12, 1838, to date.

5. All of the matters and things set forth in the above paragraph have been the subjects of investigation in minute detail by this honorable court, and is well known to them, their careful investigation resulting in the "Findings of fact" made by this honorable court in cause No. 10386 Congressional, of date April 28, 1902, and fully set forth in Senate Document No. 374 of the 1st session of the 57th Congress, a copy of which is herewith filed, and which we pray to make a part of this our petition. See Exhibit "D."

15 6. It will be seen by this document named above, as well as by the treaties of 1835–6, that the "Five-million dollar fund" was distinctly a fund of the Eastern Cherokees and not of the Cherokee Nation, although it was adjudged that a sum equal to one-third of this sum should be paid to the Western Cherokees, so called (see article 4 of the sixth treaty of Washington), and this portion was paid to the Western Cherokees September 30, 1850, pp. 556–9, Stat. at Large, so that their claim to this fund having been fully extinguished, the "Nation,"

so called, has no title whatever to the amount sought to be recovered in this controversy, although it has been so claimed; and under the Curtis Act the authorities of the "Nation" are forbidden to receive and distribute any funds belonging to the Cherokee people after the passage of that act.

7. When this court sent its "Findings of fact" to the 57th Congress that body referred this claim to the Committees on Indian Affairs of the Senate and House, and the Senate committee appointed a subcommittee to consider the bill, Senate No. 5685, Exhibit "E," of the 1st session of the 57th Congress, of Senators Morgan, Quay, McCumber, and others.

We beg leave to file herewith that bill and the report thereon of
16 that subcommittee submitted by Senator John T. Morgan, marked Exhibit "F," and to call special attention to the paragraph next to the closing one, showing why interest should be paid on this fund, and also to call attention to the hearing before the full committee, marked Exhibit "G." Wherefore, considering all of the matters and things set forth in this petition, together with the accompanying exhibits, your petitioners pray as follows, viz:

PRAYER.

That this honorable court shall render a judgment in this case in accordance with the act of March 3, 1903, awarding to the Eastern Cherokees $1,111,284.70, as found by the accountants, Messrs. Slade and Bender, with interest thereon as required by law from June 12, 1838, and shall from this sum so found to be due set apart to your petitioners their proportion of this amount, according to the number of Eastern Cherokees, to be paid to them as individuals, the name and address of each claimant, with a proper power of attorney, being distinctly set forth in the list of names and powers herewith filed, as it is not sought in this contention to interfere with the rights of such Eastern Cherokees as have employed other counsel, and thus will ever pray.

BELVA A. LOCKWOOD,
Counsellor for Petitioners.

17 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before the undersigned, a notary public in and for the District of Columbia, the attorney whose name is signed to the above petition, who, being sworn in due form of law, deposes and says: I have read the above petition by me subscribed and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true, and that I have authority under seal to sign the names of and to represent in this cause each and every one of the petitioners sought to be represented therein.

(Signed) BELVA A. LOCKWOOD,
For the Eastern Cherokees.

Sworn and subscribed before me this 7th day of March, 1903.

JAY G. WILSON,
Notary Public.

Exhibits A, B, C, D, E, F, and G, as set out herein, were filed with this petition.

18 THE EASTERN AND EMIGRANT CHEROKEES
vs.
THE UNITED STATES. } No. 23212.

III.—Amended petition, filed September 3, 1903.

Your petitioners represent as follows, viz:

1.

That they number about 4,500 persons, more or less, all Eastern or Emigrant Cherokees, residing for the most part in Cherokee, Graham, Swain, Clay, and Macon counties, North Carolina, some in north Georgia, northern Alabama, and eastern Tennessee, together with about 1,500 Emigrants, portions of their various families, gone west, nearly all of whom have been recognized as citizens and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina, and others of the same class, whose names or those of whose ancestors may be found on the rolls of 1835 and 1838.

2.

This suit is brought under authority contained on pages 16 and 17 of the Indian appropriation bill, public, No. 144, of the 2d session of the 57th Congress, passed March 3, 1903, a copy of which is herewith filed, marked "Exhibit A," and the amendment to the Cherokee agreement, Exhibit "B," otherwise known as the Cherokee allotment, public 241, pages 11, 12, and 13, of the 1st session of the 57th Congress, passed July 1, 1902, with reference to House executive doc. 309 of the 2d session of the 57th Congress, Exhibit "C," copies of these acts also filed, and containing the provision that not only all Eastern Cherokees, but that the Cherokee Nation shall be made party to any suit filed thereunder, and requiring that in causes of this kind "per capita payments shall be made directly to each individual; * * * that jurisdiction be conferred on the Court of Claims to examine, consider, and adjudicate, with a right to appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims any claim which the Cherokee tribe or any band thereof arising under treaty stipulations may have against the United States, upon which suit shall be instituted." This is one of the class of cases named. We claim as individuals, and our names and addresses are filed with this petition.

19 The roll of 1835 shows 15,000 persons East, with 2,202 removed to Indian Territory. The roll of 1838 shows 16,211 Cherokees removed. The present number still remaining in North Carolina, etc., 4,000. Number of Eastern Cherokees in Indian Territory, 17,000. Total of Eastern Cherokees, 21,000. Whole number now in Indian Territory, 40,000, including 4,000 negroes, 1,000 Shawnees and Delawares, and 4,000 adopted citizens.

3.

Wherefore we request the honorable court that not only the rest of the Eastern Cherokees, but that the Cherokee Nation, be made parties to this suit, as required by these several acts herein set forth.

4.

That the object of this suit by the claimants herein is to recover from the United States their pro rata share of that portion of the removal and subsistence fund improperly taken by the United States from the five million fund, on account of removal of Eastern Cherokees, as found by the expert accountants, Messrs. Slade and Bender, April 28, 1894, the said five million fund being an interest-bearing fund in the hands of the United States, as trustee, and representing the money paid by the Government to the Eastern Cherokees for the sale of their lands in North Carolina, northern Alabama, Georgia, and Tennessee, or east of the Mississippi River, as set forth in article 1st of the treaty of New Echota in north Georgia on March 14, 1835, and articles 2 and 3 of the supplemental treaty proclaimed May 23, 1836, this sum so misapplied amounting in accordance with said accounting to one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70), with interest at 5% per annum from the date of said wrongful taking, June 12, 1838, to date, in accordance with treaty stipulations.

5.

All of the matters and things set forth in the above paragraph have been the subjects of investigation in minute detail by this honorable court, and is well known to them, their careful investigation resulting in the "findings of fact" made by this honorable court in cause No. 10386 Congressional, of date April 28, 1902, and fully set forth in Senate Document No. 374 of the 1st session of the 57th Congress, a copy of which is herewith filed, and which we pray to make a part of this our petition. (See Exhibit D.)

6.

It will be seen by this document named above, as well as by the treaties of 1835–6, that the "five million dollar fund" was distinctly a fund of the Eastern Cherokees, and not of the Cherokee Nation, although it was adjudged that a sum equal to one-third of this sum should be paid to the Western Cherokees, so called (see article 4 of the sixth treaty of Washington), and this portion was so paid to the Western Cherokees September 30, 1850 (pp. 556–9 Stat. at Large), so that their claim to this fund, having been fully extinguished, the "nation," so called, has no title whatever to the amount sought to be recovered in this controversy, i. e., the amount contained in the second item of the commissioners' report, although it has been so claimed; and under the Curtis Act the authorities of the "nation" are forbidden to receive and distribute any funds belonging to the Cherokee people after the passage of that act. (See U. S. Stat. 30, p. 495; also act March 3, 1893.)

7.

When this court sent its "Findings of fact" to the 57th Congress, that body referred this claim to the Committees on Indian Affairs of the Senate and House, and the Senate committee appointed a subcommittee to

consider the bill, Senate No. 5685, "Exhibit E," of the 1st session of the 57th Congress, of Senators Morgan, Quay, McCumber, and others.

We beg leave to file herewith that bill and the report thereon of that subcommittee submitted by Senator John T. Morgan, marked "Exhibit F," and to call special attention to the paragraph next to the closing one, showing why interest should be paid on this fund, and also to call attention to the hearing before the full committee marked "Exhibit G." Wherefore, considering all of the matters and things set forth in this petition, together with the accompanying exhibits, your petitioners pray as follows, viz:

PRAYER.

That this honorable court shall render a judgment in this case in accordance with the act of March 3, 1903, awarding to the Eastern Cherokees $1,111,284.70, as found by the accountants, Messrs. Slade and Bender, with interest thereon as required by law, from June 12, 1838, and shall from this sum so found to be due, set apart to your petitioners their proportion of this amount, or one-fifth of the whole amount, according to the number of Eastern Cherokees, enumerated in this claim, to be paid to them as individuals, the name and address of each claimant, with a proper power of attorney being distinctly set forth in the list of names and powers herewith filed, as it is not sought in this contention to interfere with the rights of such Eastern Cherokees as have employed other counsel, and thus will ever pray.

(Signed) BELVA A. LOCKWOOD,
Counsellor for Petitioners.

21 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before the undersigned, a notary public in and for the District of Columbia, the attorney whose name is signed to the above petition, who, being sworn in due form of law, deposes and says: "I have read the above petition by me subscribed, and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true, and that I have authority under seal to sign the names of and to represent in this cause each and every one of the petitioners sought to be represented therein."

(Signed) BELVA A. LOCKWOOD,
For the Eastern and Emigrant Cherokees.

Sworn and subscribed before me this 2nd day of Sept., 1903. Interlined before signing.

(Signed) JAY G. WILSON,
Notary Public.

22 THE EASTERN CHEROKEES
vs.
THE UNITED STATES AND THE CHEROKEE NATION. } No. 23214.

IV.—Original petition, filed March 14, 1903.

To the honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioners, the Eastern Cherokees, respectfully show and represent unto your honors that—

I.

The Eastern Cherokees, the petitioners in this case, comprise those persons who were parties to the treaty of 1835–36 (7 Stats. L., p. 479); being also those persons described in article 9 of the treaty of 1846 (9 Stats. L., p. 871) as—

"Those individuals, heads of families, or their legal representatives, entitled to receive" the per capita pledged by "the treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto."

By far the larger portion of the Eastern Cherokees are now resi-
23 dent in the Cherokee Nation, Indian Territory, estimated to number more than thirty thousand in the West; while another body, estimated to number about three thousand, reside east of the Mississippi River, the larger part being located in the State of North Carolina.

II.

The Eastern Cherokees, being either the original persons, parties to the treaty of 1835–36, or their descendants, have organized by various conventions and councils in the Indian Territory and in North Carolina, and have employed by their proper authorities to represent their interests in the claim which is the subject-matter of this suit the attorneys whose names are appended to this petition.

III.

THE CLAIM.

Your petitioners, first protesting that the matters of difference between themselves and the United States, have been fully and finally adjudicated in the course of an arbitration had for the purpose (to which reference is hereinafter made), and now specially disclaiming, as they have ever done, any purpose to evade the result of said arbitration, or to admit that it is subject to impeachment on any ground, further show and state that they claim from the United States the sum of one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70), or the sum of one million seven hundred and sixty-one thousand four hundred and fifty-seven dollars and
24 twenty-seven cents ($1,761,457.27), accordingly as the court may or may not sustain the award to which reference is made in this paragraph, with interest thereon, at the rate of five per cent per annum,

from June 12, 1838, until paid, together with interest on the income annually accruing, at the rate of five per centum per annum until paid.

The method of calculating the interest forms the subject of a separate subsequent paragraph.

IV.

JURISDICTION OF THE COURT.

Section sixty-eight of the act of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation, and for the disposition of town sites therein and for other purposes" (32 Stats. L., p. 716), is as follows:

"SEC. 68. Jurisdiction is hereby conferred upon the Court of Claims, to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

On March 3, 1903, in the "act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1904, and for other purposes" (Public 144, p. 16), occurs the following provision:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together, or as two bodies, as they may be advised, the status of a band, or bands, as the case may be, for all the purposes of said section: *Provided*, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be

further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said sec-
26 tion upon the claim mentioned in House of Representatives Executive Document Numbered Three hundred and nine, of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants, to whom the judgment so rendered, equitably belongs either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be."

The claim mentioned in House of Representatives Executive Document Number Three hundred and nine of the second session of the Fifty-seventh Congress, above referred to, is the claim described in the resolution of the House of Representatives of December 16, 1902, as follows, to wit:

"*Resolved*, That the Attorney-General of the United States is hereby requested to advise the House of Representatives with all convenient speed, in the case of the Eastern Cherokees against the United States, whether or not the award rendered under the Cherokee agreement of December nineteenth, eighteen hundred and ninety-one, ratified by act of Congress approved March third, eighteen hundred and ninety-three, as set forth in House Executive Document Numbered One hundred and eighty-two of the Fifty-third Congress, third session, and the findings of fact of the Court of Claims of April twenty-eighth, nineteen hundred and two, is *res adjudicata;* to review the opinion of the Department of Justice of December second, eighteen hundred and ninety-five, and advise the House of Representatives whether the reasons set forth in that opinion now constitute a valid defense to the payment of said award."

27 Said claim is the claim of the Eastern Cherokees against the United States hereinafter particularly described and set forth.

The Cherokee Nation is made defendant in accordance with the requirement of the act of reference.

FACTS RELATING TO THE PRINCIPAL FUND.

V.

In 1803 the United States engaged with the State of Georgia to induce the Cherokee Indians within that State, as soon as practicable, to remove from the State, and to give up their tribal government within the State of Georgia; and various efforts were made on the part of the United States to induce the Cherokees to remove from the East to the West.

A number of them removed under the provisions of the treaties of 1817, 1819, 1828, and 1833: they are known as the "Western Cherokees." The removal of your petitioners, the larger portion of whom finally went to the Indian Territory, was not accomplished until after the making of

the treaty of 1835–36. That treaty contained provisions permitting those electing to do so to remain in the East; those so electing to remain in the East numbered, in 1852, about 2,133; by the last enrollment made of them, in 1884, they numbered about 3,000. This terminated the efforts on the part of the United States and the States concerned to effectuate the removal of the Cherokees from the East.

28 By article 8 of the treaty of 1828 (7 Stat. L., 311) in pursuance of the purpose of the United States and as an inducement to the Indians to remove, the United States contracted that it would pay the cost of the removal of all Cherokees from the east to the west. This contract was in full force when the treaty of 1835–36 was made, and was recognized as being in force by the authorities of the United States long after the execution of that treaty. (Eastern Cherokees vs. The United States, No. 10386, finding 6. Sen. Doc. 215, Fifty-sixth Congress, first session, p. 79, last paragraph.)

It was the general policy of the United States in the furtherance of its own purposes exclusively to pay the expenses of the removal and subsistence of the Indians when transferring them from the east to the west. Chickasaws, Choctaws, Creeks, and Seminoles, neighboring tribes to the Cherokees, had all been removed at the expense of the United States, and the Cherokees were generally informed of that fact. (Senate Doc. 215, 56th Cong., 1st sess., p. 83.)

VI.

. Under a reference by Congress your petitioners have been heretofore suitors in this court in Congressional case No. 10386, wherein the court made certain findings of fact in accordance with the reference of the claim. In said findings of fact are adjudicated nearly all the material facts necessary now to be presented, and full reference is made in this petition to said findings, some of the allegations being taken bodily from the findings.

In said case the court (finding 6) held, and it is now alleged, that:

29 "On March 5th, 1835, the Senate of the United States, by resolution, advised:

"That a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi River. (Sen. Doc. 215, 56th Cong., 1st sess., p. 77.)

"On March 14, 1835, a treaty was drawn up by J. W. Schermerhorn, commissioner, on the part of the United States, for submission to the Cherokees, in which it was proposed that the sum of five million dollars should be paid to them for their lands and possessions, in accordance with the foregoing resolution of the Senate, but that there should be deducted from the said sum of five millions of dollars two hundred and fifty-five thousand dollars for the expenses of the removal of the members of the tribe. (Ibid., 81 and 82.)

"At this time the treaty of 1828 (7 Stats. L., 313) was in full force, by the 8th article of which it was provided that the United States would pay the cost of removal of the Cherokees from the east to the west.

"This proposed treaty was rejected by the Cherokee council on October 23, 1835, for the reason that the expense of removal was proposed to

be charged to the five million dollar fund (Ibid., 83, par. 5.) The rejection of this treaty was unanimous. (Sen. Doc. 120, 25th Con., 2d sess., 459.)

"During the consideration of this proposed treaty by the Indians a letter from President Jackson, bearing date March 16, 1835, was read to the Cherokees, purporting to explain the proposed treaty That letter is as follows:

"'I shall in the course of a short time appoint commissioners for the purpose of meeting the whole body of your people in council. They will explain to you more fully my views and the nature of the stipulations which are offered to *to* you.

"'These stipulations provide—

"'1st. For an addition to the country already assigned to you west of the Mississippi, and for the conveyance of the whole of it, by patent, in fee simple, and also for the security of the necessary political rights, and for preventing white persons from trespassing upon you.

30 "'2d. For the payment of the whole value to each individual of his possessions in Georgia, Alabama, North Carolina, and Tennessee.

"'3d. For the removal, at the expense of the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of one hundred and fifty dollars to each person.

"'4th. For the usual supply of rifles, blankets, and kettles.

"'5th. For the investment of the sum of four hundred thousand dollars, in order to secure a permanent annuity.

"'6th. For adequate provisions for schools, agricultural instruments, domestic animals, missionary establishments, the support of orphans, etc.

"'7th. For the payment of claims.

"'8th. For granting pensions to such of your people as have been disabled in the service of the United States.

"'These are the general provisions contained in the arrangement. But there are many other details favorable to you which I do not stop here to enumerate, as they will be placed before you in the arrangement itself. Their total amount is four million five hundred thousand dollars, which, added to the sum of five hundred thousand dollars, estimated as the value of the additional land granted you, makes five millions of dollars—a sum, if equally divided among all your people east of the Mississippi, estimating them at ten thousand, which I believe is their full number, would give five hundred dollars to every man, woman, and child in your nation. There are few separate communities, whose property, if divided, would give to the persons composing them such an amount.'" (Sen. Doc. No. 215, 56th Con., 1st sess., p. 82.) (Eastern Cherokees vs. United States, No. 10386. Finding 6.)

This proposed treaty of March 14, 1835, rejected October 23, 1835, in article 18 contained an estimate for carrying into effect the several stipulations of the proposed treaty. The estimate for removal was two hundred and fifty-five thousand dollars. The estimate for sub-

31 sistence was four hundred thousand dollars (Senate Doc. No. 215, 56th Congress, 1st session, p. 82.)

VII.

Immediately after the rejection of the above treaty a convention of Cherokees was appointed by Commissioner Schermerhorn to convene at New Echota on the 21st day of December, 1835, proposing to make a treaty with such Cherokee people as should assemble there, and declaring that those who did not come should be held as having given their assent and sanction to whatever should be transacted at that council. (Revision of Indian Treaties, p. 67.)

This treaty was effected not only without any authority of the Cherokees, but over their solemn protest. It was procured by bribery and coercion, and was bitterly repudiated by the great body of the Cherokees, of whom nineteen-twentieths were violently opposed to it. (Western Cherokees vs. U. S., 27 Ct. Cls., pp. 21–30.)

By article 8 of this treaty the United States agreed and stipulated—

"To remove the Cherokees to their new homes, and to subsist them one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician, well supplied with medicines, shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in
32 lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it."

By article 16 it was agreed that the Cherokees should remove to their new homes within two years from the ratification of this treaty. The treaty was ratified May 23, 1836, and the two years expired on May 23, 1838, a day notable in this history, as will hereafter appear.

By article 1, in consideration of five million dollars, the Cherokee Nation conveyed to the United States their lands east of the Mississippi River, and released all their claims upon the United States for spoliations, with the agreement that the question as to the duty of the United States to allow an additional sum of three hundred thousand dollars for the spoliations should be submitted to the Senate for their decision. The question of spoliation was decided in favor of the Cherokees, as shown in the supplementary articles of the treaty.

By article 15 it was agreed that the five million dollars, after deducting the amounts actually expended for the payment of improvements, ferries, claims for spoliations, removal, subsistence, and debts and claims of the Cherokee Nation, and the several sums to be invested to constitute the general national funds, should be equally divided among the Eastern Cherokees.

VIII.

"After the signature of the treaty the leaders of the treaty party who signed the treaty contended that the sum of $5,000,000 was not intended to include the amount which might be required to remove them.
33 The President was willing that this subject should be referred to the Senate for its consideration, to the end that if the expense of

removal was not to be charged to the treaty fund, such further provisions should be made therefor as might appear to the Senate to be just. The Senate thereupon agreed that the sum of $600,000 should be allowed to the Cherokee people to include the expense of their removal. This sum was estimated as more than sufficient to pay the cost of such removal, and it was provided that whatever surplus remained after the payment of the expenses of removal, and certain other claims, should be turned over and belong to the education fund (7 Stat. L., p. 489, Supp. Art. 3).

"On July 2, 1836, Congress confirmed the action of the Senate and appropriated the $600,000 (5 Stat. L., p. 73)." (Eastern Cherokees vs. U. S., No. 10386, finding 6.)

On July 2, 1836 (the same day), Congress appropriated the $5,000,000 pledged to the Cherokees by the above treaty, less $500,000 stipulated to be paid for the lands provided for them west of the Mississippi, known as the neutral lands, comprising 800,000 acres in Kansas (5 Stat. L., 73).

By the terms of this treaty the Eastern Cherokees ceded and conveyed to the United States lands in Tennessee, Georgia, Alabama, and North Carolina, comprising seven million eight hundred and eighty-two thousand two hundred and forty acres.

The country was splendidly watered, finely timbered, and contained great quantities of marbles and other minerals, including gold, which was then thought of enormous value. Through their principal chiefs
34 they demanded twenty millions of dollars for this country (Senate Doc. No. 392, 56th Cong., 1st session, p. 4; History of Cherokee Indians, Joyce, Bureau of Ethnology, p. 378).

Their title to this country was unquestioned. (Worcester vs. Georgia, 6 Peters, 516; Cherokee Nation vs. Georgia, 5 Peters, 1.)

They received for this country 800,000 acres in Kansas, thus yielding to the United States 7,082,240 acres net, for which the Eastern Cherokees were to receive $4,500,000. This fund was to pay not only for the land but for improvements and ferries.

As will be hereinafter more particularly shown, the matters of account between the Eastern Cherokees and the United States were submitted to two Government experts, who made a report known as the Slade-Bender award. In the account stated by them it is shown that there was paid for improvements, $1,540,572.27; for ferries, $159,572.12; a total of $1,700,144.39.

The treaty of 1835–36 thus realized to the Eastern Cherokees for their lands (7,082,240 acres) the promise of $2,799,855.61. If the sum subsequently charged for removal and subsistence, to wit, $2,952,196.26, were properly chargeable against this fund, it would leave the Eastern Cherokees indebted to the United States, and, therefore, without any consideration moving the Indians to cede exceeding seven millions of acres of land to the United States, and without any consideration for complying with the urgent desire of the United States to relinquish their homes and move into the unbroken wilderness west of the Mississippi River.

35 **IX.**

In the said award of the accountants, Slade and Bender, it was said, and your petitioners therefore charge, that—

"It seems to have been the opinion of the War Department, as late as November 18, 1836, that article 8 of the treaty of 1828" [providing

that the United States would remove the Cherokees from the East to the West at the expense of the United States], "Was not superseded or annulled by the treaty of 1835. On that date Mr. Commissioner Harris wrote Maj. B. F. Curry, Indian agent in the Cherokee country, as follows:

"'SIR: I acknowledge the receipt of your letter of the 26th of October last, and in reply have to observe that I have taken the decision of the Secretary of War ad interim upon the claim of the Cherokees to commutation for subsistence at $33.33 each. The Secretary decides that the commutation may be paid at the rate above stated; but at the same time declares that the allowance is made under the treaty of 1828, and not in pursuance of any stipulation of the final treaty of 1835.'

"The same opinion has been held in various reports to the Senate and the House of Representatives from the Committee on Indian Affairs." (Senate Doc. No. 215, 56th Congress, 1st session, pp. 79–80.)

X.

After the treaty of 1835 had been made, enrollment books for voluntary emigration were opened in the then Cherokee country. Instructions as to the nature of the enrollment were sent out by the Acting Secretary of War, C. A. Harris, to Lieutenant J. Van Horne, U. S. A., dated October 12, 1837, in part as follows:

"Enrolling books must be prepared on the following plan: A
56 memorandum or entry must be inserted, purporting that the subscribers assent to a treaty with the United States upon the terms heretofore offered by the President to their people, and that if no treaty should be made during the next fall, or early in the winter, then the subscribers will cede to the United States all their right and interest in the Cherokee lands east of the Mississippi, upon the following conditions: That they shall receive, so fast as Congress shall make the necessary appropriations, the ascertained value of their improvements, on their arrival West; that they shall be removed and subsisted for one year at the expense of the United States; that they shall be entitled to all such stipulations as may be hereafter made in favor of those who do not now remove, excepting so far as such stipulations may depend on the cession of rights or improvements for which the subscribers have been previously allowed a compensation. (Senate Doc. No. 215, 56th Congress, 1st session, page 83.)

XI.

"In May, 1838, the President transmitted to Congress a letter from the Secretary of War to John Ross, principal chief of the Cherokee Nation, bearing date of May 18, 1838, in which it was said:

"'If it be desired by the Cherokee Nation that their own agent should have charge of their emigration, their wishes will be complied with, and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect. With regard to the expense of this operation, which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made of Congress.'

"This last communication was transmitted to Congress; and on May 23, 1838, the House of Representatives, by resolution, required a statement of the amount necessary to pay for the removal and subsistence of the Cherokees (ibid., 78). On May 25, 1838, the Secretary of
27 War submitted an estimate to the Speaker of the House of Representatives 'of the amount that would be required' to remove 15,840 Cherokees, and to subsist 18,336 Cherokees, stating that the sum necessary for this purpose was $1,047,067 (ibid., 78); and on June 12, 1838, Congress appropriated the amount of this estimate with the provision that no part of it should be deducted from the $5,000,000 fund (5 Stat. L., 242).

"Without further appropriation the removal of the Indians (except a small number which never removed) was accomplished." (Eastern Cherokees vs. U. S., No. 10386, finding 6.)

The estimate submitted by the Secretary of War above referred to is as follows:

"In compliance with the resolution of the House of Representatives of the 23rd instant, requiring a statement of the amount that will be required for the additional allowance proposed to be made to the Cherokees, I have the honor to present the following estimate:

The payment of the expenses of removing the remaining Cherokees, estimated at 15,840, at $30 a head	$475,200.00
Amount applicable to that purpose	39,300.00
Balance to be provided for	435,900.00
If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival in the West, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated to be paid by treaty, viz. $33.33 a head	611,167.00
	1,047,067.00

(Sen. Doc. 215, 56th Congress, 1st sess., p. 78.)

"On June 12, 1838, Congress appropriated the full amount estimated by the Secretary of War as sufficient to remove and subsist the Cherokees as follows, to wit:
38 "SEC. 2. And be it further enacted, That the further sum of one million forty-seven thousand and sixty-seven dollars be appropriated, out of any money in the Treasury not otherwise appropriated, in full for all objects specified in the third article of the supplementary articles of the treaty of eighteen hundred and thirty-five, between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal West.

"Provided, That no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty: And provided further, That the said Indians shall receive no benefit from the said appropriation, unless they shall complete their emigration within such a time as the President shall deem reasonable, and without coercion on the part of the Government."

(Act June 12, 1838, 5 Stats. L., 242.)

XII.

The cost of removing the Cherokees from Georgia to the Indian Territory was $1,493,485.92, of which $382,201.22 was paid out of the amounts appropriated ($1,647,067) for removal by the acts of July 2, 1836, and June 12, 1838, the balance, $1,111,284.70, being charged against the five million dollar fund, as above set forth, which still remains a charge against that fund. (Eastern Cherokees vs. U. S., No. 10386, findings 5.)

This sum, $1,111,284.70, with interest thereon, is the fund now claimed by the Eastern Cherokees as due to them, and is the same fund found due by the Slade and Bender award under the Cherokee agreement of December 19, 1891, as hereinafter set forth.

39 Your petitioners state and charge that under the law appropriating $600,000 primarily for the purpose of removal, and the $1,047,067 for the same purpose, it was the duty of the defendant to have made the expense of removal the first charge upon the said sums appropriated for such purpose. That this view as to the duty of the defendant was fully set forth in the opinion of the Attorney-General of the United States, Hon. B. F. Butler, on December 6, 1837 (Opinions Attorney-General, vol. 5, p. 297), in which he held that—

"The expense of removal is undoubtedly the first charge on the $600,000."

Your petitioners state and charge that the defendant had no right to charge the trust fund of five million dollars appropriated in payment of the lands and improvements of the Eastern Cherokees with the expense of removal, which they now charge was an obligation exclusively of the United States, entered into by the United States in fulfillment of its own policy and for its own purposes, and for the payment of which an abundant sum of money had been appropriated.

XIII.

When the Eastern Cherokees removed in 1838 to Indian Territory they took with them the government of which John Ross was the principal chief, and this led to a conflict with the Western Cherokees, who were unwilling to relinquish the government they had previously established and to be merged into and overwhelmed by the government organized by the Eastern Cherokees. As was said by this court—

40 "The Western Cherokees maintained that they were possessed of their own country, purchased with their own money, subject to their own laws, ruled by their own constituted authorities, and that the coming of the Eastern Cherokees, uninvited, so far as they were concerned, could not overthrow their existing constitution and government. Either party's deductions were right from their own premises. The trouble was that the two were utterly irreconcilable, and the certainty was that if the Western Cherokees acceded to the seemingly fair proposition to hold a council and frame a government for all they would immediately be swallowed up in the overwhelming majority of the Eastern Cherokees" (27 Ct. Cls., 30).

This conflict produced internal disorder of the gravest character between the Eastern and Western Cherokees, and made the treaty of 1846 imperative.

XIV.

In the specific words of the Court of Claims in the case of the Eastern Cherokees vs. U. S., No. 10386, Congressional, Finding VII, it is further shown that—

"The treaty of 1846 between the United States and the Cherokee Nation was entered into to restore peace and harmony among the Cherokee factions, to settle the claims of the Indians against the United States (preamble, treaty 1846, 9 Stat. L., p. 871) and 'to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be' (Western Cherokee Indians vs. the United States, 27 Ct. Cls., 36, par. 5).

"At the time when the treaty with the Cherokees of August 6, 1846 (9 Stat. L., p. 871), was being negotiated the Cherokees insisted that the treaty fund had been improperly charged with various sums, which ought to be corrected, and that they should receive from the
41 United States a fair and just settlement which should only exhibit money properly expended under the treaty of 1835. Accordingly, when the treaty of 1846 was drawn up, it was provided in article three that various sums which had been improperly charged to the five million dollar fund should be reimbursed, to wit:

"Those sums paid for rents under the name of improvements and spoliations for property of which the Indians were dispossessed, and under the head of reservations, and under the head of expenses of making the treaty of New Echota; and the United States agreed to reimburse all other sums paid to any agent of the Government and improperly charged to said fund (9 Stat. L., 872).

"By the ninth article of the treaty, arranging the general plan of settlement, it was provided as follows:

"'The United States agrees to make a fair and just settlement of all moneys due to the Cherokees and subject to the per capita division under the treaty of the 29th of December, eighteen hundred and thirty-five, which said settlement shall exhibit all money properly expended under said treaty and shall embrace all sums paid for improvements, ferries, spoliations, removal subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835—the aggregate of which said several sums shall be deducted from the sum of six million six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, per capita in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplements of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto' (9 Stat. L., 875)." This amount of six million six

hundred and forty-seven thousand and sixty-seven dollars was made up as follows:

42 The treaty fund of 1835	$5,000,000
Supplementary articles fund	600,000
Appropriation act, June 12, 1838 (5 Stat. L., 242)	1,047,067
Total	$6,647,067

"The treaty also provided that, whereas the Cherokee delegation contend that the amount expended for the one year's subsistence after the arrival in the West of the Eastern Cherokees is not properly chargeable to the treaty fund, it was thereby agreed that the question should be submitted to the Senate of the United States for its decision, which should decide whether the subsistence was to be borne by the United States or by the Cherokee funds; and if by the Cherokees, then to say whether the subsistence should be charged at a greater rate than thirty-three and thirty-three one-hundreths dollars per head; and also the question whether the Cherokee Nation should be allowed interest on whatever sum should be found to be due the nation, and from what date and at what rate per annum.

"The Senate of the United States, acting as umpire under article eleven of the treaty of 1846, on September 5, 1850, passed the following resolution:

"'Resolved by the Senate of the United States, that the Cherokee Nation of Indians are entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the Treasury.

"'Resolved, that it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid' (Sen. Journal, Thirty-first Congress, first session, p. 602).

43 "This last amount was accordingly appropriated by Congress for that purpose by the act of September 30, 1850, with the provision that interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate of the 5th of September, 1850" (9 Stat. L., 556).

XV.

In the words of the same opinion (Finding VIII), it is further shown that—

"Under the ninth article of the treaty of 1846 the accounting officers of the United States made and prepared the account for settlement prescribed by that article, whereby it appears that after crediting the treaty fund of five million dollars with the cost of subsistence of the Indians at the West, with which it had been charged, there would remain a balance of nine hundred and fourteen thousand and twenty-six dollars and thirteen cents. Congress accordingly appropriated, in addition to the amount of one hundred and eighty-nine thousand four hundred and twenty-two

dollars and seventy-six cents, which had been appropriated pursuant to the resolution of the Senate, seven hundred and twenty-four thousand six hundred and three dollars and thirty-seven cents; and there was thereupon paid and distributed to the Eastern Cherokees, per capita, the above amounts, with interest thereon at five per cent from June 12, 1838, the same being paid and accepted under the act of September 30, 1850 (9 Stat. L., p. 556), which provided—

"'That said money shall be paid by the United States and received by the Indians on condition that the same shall be in full discharge of the amount thus improperly charged to the said treaty fund.'

"And under the act of February 27, 1851, which provided—

"'That the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore
44 made with the Cherokees. And the said Cherokee Nation shall, on the payment of such sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation, and except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees.'

"On the 27th of November, 1851, the Cherokee national council, before the payment of any of said money or making any receipt therefor, passed a formal protest against the treaties of December 26, 1835, and the 6th of August, 1846, and the settlement made under their provisions, using in said protest the following language with reference to the expenses of the removal:

"'Because no allowance is made for the sums taken from the treaty fund for removal to the West, although the charge depended upon precisely the same words in the treaty of 1835 as did the one year's subsistence, and the Senate unanimously decided upon the question submitted to them as arbitrators that the item of subsistence was not a proper charge upon the Cherokee fund. That had been the decision of the Senate about the date of the treaty when that question was specially presented. It was so considered by Mr. Poinsett, Secretary of War, in June, 1838, and his decision was sanctioned by act of Congress, and an appropriation was made for that purpose; but, the estimates being too small by half, the Indian fund was then for the first time seized upon.'

"This protest was transmitted to and received by the Commissioner of Indian Affairs during the month of April, 1852.

"Thereafter the said total amount of $914,026.13 was duly paid and distributed to and among the Cherokees, and the Cherokees executed to the United States the full and final discharge of all claims and demands whatsoever on the United States, as required by the statute aforesaid. This discharge was in the form following:

"'We, the undersigned Emigrant or Eastern Cherokees, do hereby
45 acknowledge to have received from John Drennen, Superintendent Indian Affairs, the sums opposite our names, respectively, being in full of all demands under the treaty of sixth of August, eighteen hundred and forty-six, according to the principles established in the ninth article thereof, and appropriated by Congress per act 30th of September, 1850, and per act 27th of February, 1851, which reads as follows: "And the

said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by treaty to pay to said Cherokee Nation, and except also such money and lands, if any, as the United States may hold in trust for said Cherokees.'"

It will be observed that this payment, divided among 16,231 Eastern Cherokees, to wit, 14,098 in the West and 2,133 in the East, made a per capita only of $56.31, although promised specifically by President Andrew Jackson a per capita payment of one hundred and fifty dollars each (Eastern Cherokees vs. U. S., No. 10386, finding 6).

The payments to the Western Cherokees, who numbered 3,146 persons, in so far as relates to the per capita based upon the balance of the five-million-dollar fund, were as follows:

In 1852	$532,896.90
In 1894	212,376.94

making a total of $745,273.84, excluding interest, thus making a per capita to the Western Cherokees of $236.89.

If in addition to the amount paid to the Eastern Cherokees
46 in 1852, to wit, $914,026.13, there had been paid also the amount of $1,111,284.70, the per capita to the Eastern Cherokees would have been $124.78 less than the amount promised them in President Jackson's letter and about one-half of what the Western Cherokees have actually received as their per capita, under a treaty which was intended to place these people, as joint grantors of the same property, upon exactly the same basis as far as was practicable.

XVI.

Both the Eastern Cherokees and the Western Cherokees strenuously protested against the settlement of 1852 and made repeated demands upon the Government of the United States for settlement from that time forward. Finally, the Western Cherokees were permitted by act of Congress, upon the 25th of February, 1889 (25 Stat. L., 694), to take their claim into the Court of Claims, with right of appeal to the Supreme Court, and a decision was rendered in favor of the Western Cherokees by the Court of Claims November 30, 1891 (27 Ct. Cls., p. 1), and by the Supreme Court of the United States April 3, 1893 (148 U. S., p. 427).

The Western Cherokees, by the fourth article of the treaty of 1846, were to receive a sum equal to one-third the balance of the five-million-dollar fund due the Eastern Cherokees according to the plan laid down in article 4 of the treaty of 1846. The balance which the old settlers actually received under the final judgment of the court, including that received in 1852, was $745,273.84. By way of comparison, it is
47 to be observed that the Eastern Cherokees, if they had received the residuum, of which this sum was estimated to be a sum equal to one-third, would have received three times that amount, or the sum of $2,235,820.52, and, deducting $914,026.13, which was actually paid to them in 1852, would have received a balance of $1,321,794.39, a sum somewhat larger than that awarded in the Slade and Bender accounting, to which reference is hereinafter made.

XVII.

It is further shown, in the language of the court's opinion, in the case of the Eastern Cherokees, No. 10386, Congressional Finding IX, that—

"At the time of the negotiations for the sale of the lands belonging to the Cherokee Nation, known as the 'Cherokee Outlet,' in 1891, the Cherokees again renewed their contention that their five-million-dollar trust fund had been improperly charged with the expense of the removal to the Indian Territory. Accordingly, on the 19th of December, 1891, an agreement was entered into between the Cherokee Nation and the United States for the sale of the Cherokee Outlet, being the agreement referred to and described in the act of March 3, 1893 (27 Stat. L., 640, sec. 10), whereby it was provided, among other things, that—

"'Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its
48 national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised, but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in its favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.' (Senate Ex. Doc. No. 56, Fifty-second Congress, first session; 27 Stat., 643.)

"Congress on March 3, 1893 (27 Stat. L., 640), ratified the Cherokee agreement, and on the same day (27 Stat. L., 643) appropriated five thousand dollars for the employment of experts to render a complete account of moneys due the Cherokees as required in the fourth subdivision of article two of said agreement. Under this provision Messrs. James A. Slade and Joseph T. Bender were appointed commissioners to render the account referred to in such agreement. The commissioners made their report, bearing date April 28, 1894, whereby, among other things, they reported that 'The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement, and the result of the finding is submitted in the following schedule:

"'Under the treaty of 1835: Amount paid for removal of Eastern

Cherokees to the Indian Territory, improperly charged to the treaty fund, $1,111,284.70, with interest from June 12, 1838, to date of payment.'"

49 XVIII.

The accounting provided for was to be made through an "agent appointed by authority of the national council."

Hon. R. F. Wyly was so appointed. The accounting was made to him, and by him submitted to the Cherokee National Council. The accounting was accepted by the Cherokee National Council December 1, 1894, and Hon. R. F. Wyly, having performed his duty, was discharged from further service. The accounting provided by law having been made by James A. Slade and Joseph T. Bender, on April 28, 1894, they were discharged from further service, their labors having been completed.

The entire transaction was made in a usual, orderly, methodical manner, strictly in accordance with the law of March 3, 1893, and in accordance with the terms of the said Cherokee agreement, entered into on the 19th day of December, 1891, and ratified by Congress on March 3, 1893.

In this agreement the United States deliberately omitted any right of appeal against this award to be reserved to the United States, for the reason, probably, as stated by the United States commissioners making the treaty, to wit:

"Because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been
50 done properly, no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for the legal discharge of old ones." (Sen. Doc. 215, 56th Cong., 1st sess., p. 44.)

On February 6, 1892, Hon. Thomas J. Morgan, Commissioner of Indian Affairs, quotes this language of the United States commission, in his report to the Secretary of the Interior, and says:

"This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it. In order to prepare a statement of this kind, it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant and assistants, and in the draft of a bill for the ratification of the agreement herewith enclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose." (Sen. Doc. 215, 56th Cong., 1 sess., p. 41.)

On February 25, 1892, Hon. George H. Shields, Assistant Attorney-General, in his report to the Secretary of the Interior, upon this proposed "complete" account, takes the ground that the terms of agreement are sufficiently clear to secure such an accounting as should be a full and "final settlement" of all claims and accounts of these Indians against the United States, and puts the following construction on the meaning of this agreement:

"The fourth and next provision of article 2 of the agreement required the United States to render to the Cherokee Nation a complete account-

ing of all moneys agreed to be paid to the Indians which they may
51 be entitled to under any treaty or act of Congress since 1817. And if said accounting is satisfactory, Congress shall make the necessary appropriation to pay the same; but if the accounting is not satisfactory, then the Cherokees are to have the right to institute suit in the Court of Claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

"I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting." (Sen. Doc. 215, 56th Cong., 1 sess., p. 55.)

Upon this opinion of the Assistant Attorney-General that the accounting under the terms of the agreement would secure a full and "final" settlement, or that a full and "final" settlement should be obtained, and that the terms of the agreement were sufficiently clear to secure such an accounting, Congress by its act of March 3, 1893 (27 Stat., 640), referring to the Cherokee agreement, said:

"Which said agreement, set forth in the message of the President of the United States communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress * * * and said agreement is hereby ratified by the Congress of the United States * * * and the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States."

The same act further provides (27 Stat., 643) that—

"The sum of $5,000, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary
52 of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement."

Under this authority of the statute directing the complete account to be rendered, and appropriating money to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ expert persons, the Commissioner of Indian Affairs, in pursuance of the duty imposed on him by law, employed James A. Slade, formerly of the Department of State, and Joseph T. Bender, both able and competent accountants, the latter having for a long time been in the finance division and in charge of said division of the Indian Office, and thoroughly familiar with and experienced in the financial and accounting methods of the Indian Bureau, and at present chief of the Indian division of the Department of the Interior.

On April 28, 1894, the "complete" account provided for was rendered.

On December 1, 1894, the Cherokee national council accepted these said accounts, and requested the Secretary of the Interior "to so notify the Congress of the United States and ask for an immediate appropriation in accordance with the act of March 3, 1893."

On January 7, 1895, the Secretary of the Interior, under the seal of his office, with unusual formality, certified to Congress a true and literal copy of the award, together with the act of acceptance of said award by the Cherokee national council, in the following language:

53 DEPARTMENT OF THE INTERIOR,
Washington, D. C. January 7th, 1895.

SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress, approved March 3, 1893 (27 Stat., 643), a certified copy of "a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect," prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy with an act of the Cherokee national council accepting such account.

Very respectfully,

HOKE SMITH, *Secretary.*

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.
(Senate Doc. 215, 56 Cong., 1 sess., p. 71.)

XIX.

The House of Representatives and the Senate, with the approval of the President of the United States, in the act of March 2, 1895 (28 Stats. L., 795), referred to

"The account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1836, 1846, 1866, 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect" (as having been) "prepared in accordance with the provisions of the act of March 3, 1893, and reported to Congress in House Executive Document No. 182, 53d Congress, 3d session." (Sen. Doc. 215, 56 Cong., first session, p. 12.)

54 Congress thus concluded that the Slade-Bender accounting had been rendered in the manner agreed upon and authorized by Congress.

And as was said by the Court of Claims in the case of the Eastern Cherokees against the United States (Congressional 10386, Finding X):

"The account as thus stated by Messrs. Slade and Bender was rendered to the Cherokee Nation and duly accepted by act of their national council in the manner and form provided in the agreement, and no suit has been brought by the Cherokee Nation against the United States in the Court of Claims, charging that such account was incorrect and unjust."

XX.

Your petitioners charge that the defendant, the Cherokee Nation, through its corporate authorities, now claims the fund sought to be

recovered by your petitioners, as due to the Cherokee Nation as a political body, on the ground that the accounting of moneys due to the Cherokee Nation was provided by the agreement of 1891 to be rendered to the Cherokee Nation, and that it is not due to the Eastern Cherokees.

Your petitioners call attention to the fact that the term "Cherokee Nation" has been variously used in the treaties and laws relating to the Cherokees to represent not only the Cherokee Nation as a political body, but also to represent the Cherokee people composing its citizenship in whole or in part. For example, the term "Cherokee Nation" was used in the treaty of 1835–36, although the Cherokee Nation there referred to was composed exclusively of the Eastern Cherokees. The
55 "Cherokee Nation" of the treaty of 1833 comprised exclusively the Western Cherokees.

The term "Cherokee Nation," as used in the 11th article of the treaty of 1846, was properly interpreted by the Senate to mean the Eastern Cherokees on the one part and the Western Cherokees on the other part, and the Senate, as umpire under the reference, found that interest should be allowed upon the sums due the Eastern Cherokees and upon the sums due the Western Cherokees, at the rate of five per cent per annum from June 12, 1838, until paid. This construction by the Senate, as hereinafter shown, was confirmed by Congress and by the Supreme Court of the United States in various instances.

The term "Cherokee Nation" in the acts of Congress of September 30, 1850 (14 Stat. L., 536), and of February 27, 1851 (14 Stat. L., 572), was used by Congress in making the appropriations of those dates, although the term was intended to describe the Eastern Cherokees exclusively, and the sums so appropriated were paid to the Eastern Cherokees per capita exclusively, in accordance with the opinion of Attorney-General Crittenden of April 16, 1851 (5 opinions, 320), holding that the term "Cherokee Nation" in these acts referred exclusively to the Cherokees described in the 9th article of the treaty of 1846, and declaring that payment per capita to the Eastern Cherokees was payment to the Cherokee Nation, but that payment to the national authorities might not be so. The Cherokee Nation accepted this construction of the
56 Attorney-General as correct and proper, and entered no objection whatever to the payment made in accordance with the opinion.

XXI.

At the time of the making of the agreement of December 19, 1891, the Eastern Cherokees residing in the Indian Territory were not maintaining an organization as such. After the rendition of the award of Slade and Bender and its submission to Congress by the Secretary of the Interior, the corporate authorities of the Cherokee Nation failed to prosecute the award before the committees of Congress. This neglect resulted in an item on the legislative appropriation act of March 2, 1895 (28 Stats. L., 795), referring this adjudicated claim for review to the Attorney-General of the United States. The corporate authorities of the Cherokee Nation by gross neglect allowed this adjudicated claim so referred to the Attorney-General to be passed on by him without any appearance whatever, and an opinion of the Attorney-General was rendered adverse to the rights

of your petitioners, because, as your petitioners believe, of such neglect on the part of the corporate authorities of the Cherokee Nation.

No record anywhere appears of any services rendered by the said Cherokee Nation in prosecuting the rights of your petitioners in the matter of the award referred to.

On June 28, 1898, by an act of Congress commonly known as the "Curtis Act" (30 Stats. L., 495) the Cherokee Nation was dismantled. Its judiciary was abolished. Its county government was set aside. Its
57 right to pass laws for the government of persons and property within its own borders was taken away. The right to enforce its own laws was denied. The right of enforcement of its laws in the courts of the United States was forbidden. It was further provided as follows:

"SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments, or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under the direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

In February, 1900, the Cherokee Nation having made no progress whatever in the collection of the moneys due the Eastern Cherokees under this award, the Eastern Cherokees residing in the Cherokee Nation called a general convention, and organized in pursuance of their common law right, and under the authority of the second article of the treaty of 1846, providing that—

"All party distinctions shall cease except so far as they may be necessary to carry out this convention or treaty. * * *

"Full authority shall be given by law to all or any portion of the Cherokee people peaceably to assemble and petition their own government or the Government of the United States for the redress of grievances and to discuss their rights."

The general convention of the Eastern Cherokees organized on February 14, 1900, and called a further general convention for April
58 3, 1900. On this last date a permanent council was established and steps were taken to prosecute the rights of the Eastern Cherokees and to employ counsel.

On September 4, 1901, a further convention or council was held by the Eastern Cherokees, confirming the steps previously taken for the prosecution of their rights. Under the authority of this organization and cooperating with a similar organization upon the part of the Eastern Cherokees residing east of the Mississippi River, who had already presented their claim to the Congress of the United States (Sen. Doc. 143, 54th Cong., 1st sess.), the Eastern Cherokees presented to Congress proper memorials, setting up their rights in the premises as follows: March 12, 1900, Sen. Doc. 215, 56th Cong., 1st sess.; April 11, 1900, Sen. Doc. 282, 56th Cong., 1st sess.; April 21, 1900, Sen. Doc. 305, 56th Cong., 1st sess.; April 23, 1900, Sen. Doc. 308, 56th Cong., 1st sess.; May 22, 1900, Sen. Doc. 392, 56th Cong., 1st sess.; December 11, 1900, Sen. Doc. 35, 56th Cong., 2d sess.

On February 20, 1901, under the urgent demands of the Eastern

Cherokees, through the organization aforesaid, the Senate of the United States passed a resolution committing to the Court of Claims under the Bowman Act Senate bill No. 3681 of the 56th Congress, 1st session, which had been introduced for the purpose of providing a settlement of the very matter now the subject of this suit. The Cherokee Nation intervened in said suit of the Eastern Cherokees against the United States (No. 10386), and the Court of Claims decided the facts in said case on April 28, 1902.

59 Upon the findings of fact made by this honorable court in the case referred to, the Eastern Cherokees demanded of Congress immediate payment of the money due. In the meantime, as your petitioners are informed and charge, the Cherokee Nation again set up the claim that the award of Slade and Bender having been rendered to the Cherokee Nation the money due under such award was due and payable to the Cherokee Nation as a body politic. The House of Representatives by resolution of December 16, 1902, referred the demand of the Eastern Cherokees to the Attorney-General of the United States for an opinion as to whether or not the said award and the finding of the court in the case referred to was res adjudicata. The attorneys of the Eastern Cherokees appeared and presented this matter before the Department of Justice, and their contention was controverted by the principal chief of the Cherokee Nation, who claimed that the amount found due by Slade and Bender was due to the Cherokee Nation as a body politic and to all of the citizens thereof, and not to the Eastern Cherokees, your petitioners.

The Attorney-General declined to render an opinion, as requested by the resolution of the House of Representatives (H. R. Doc. 309, 57th Cong., 2d sess.), but reported to Congress that the Cherokee Nation asserted a right to this claim adverse to the claim of the Eastern Cherokees, and advised that the matter should be litigated in court. Thereupon the Congress of the United States passed the act hereinbefore set

60 forth in Paragraph IV of this petition, authorizing the institution of this suit, and requiring that both your petitioners and the Cherokee Nation be made parties thereto.

XXII.

In said suit, No. 10386, decided by this honorable court on April 28, 1902, in which the Cherokee Nation, as hereinbefore alleged, intervened by petition, claiming this money for the nation, the court found—

"But the Cherokees who removed to the Indian Territory after the signature of the treaty of December 29, 1835, as well as those who remained permanently east of the Mississippi, continued to be popularly known as the Eastern Cherokees, and all Eastern Cherokees by virtue of their individual rights as members of the Cherokee Nation are the parties claimant in this suit."

XXIII.

In the award of Slade and Bender, hereinbefore referred to, were embraced four items, to wit:

(a) The value of certain lands under the treaty of 1819 (with interest from February 27, 1819, until paid)	$2,125.00
(b) Amount paid for removal of the Cherokees to the Indian Territory improperly charged to the treaty fund under the treaty of 1835 (with interest from June 12, 1838, until paid)	$1,111,284.70
(c) Amount received by receiver of public moneys at Independence, Ks., under the treaty of 1866 (with interest from January 1, 1874, until paid)	$432.28
(d) Interest on $15,000 of Choctaw funds applied in 1863 to relieve all indigent Cherokees under act of Congress of March 3, 1893	$20,406.25

61 The Eastern Cherokees make no claim to any of these four items except the second, to wit, the amount of $1,111,284.70, improperly charged to the five million dollar fund. As to the other three items of this award, the right of the Cherokee Nation as a nation to maintain a suit and receive an award of judgment is not denied by the Eastern Cherokees.

XXIV.

FACTS RELATING TO INTEREST.

By Article II of the treaty of 1846, the question whether the Cherokee Nation should be allowed interest on whatever sums might be found to be due the nation, and from what date and at what rate per annum, was left to the Senate of the United States as umpire to decide.

On September 5, 1850, the Senate, acting as umpire, under this article, passed the following resolution:

"Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid." (Eastern Cherokees vs. U. S., No. 10386, Finding 7.)

Congress by numerous acts confirmed and validated this decision of the Senate of the United States.

Congress ratified this resolution of the Senate in the following acts; to wit:

On September 30, 1850, in appropriating $189,422.76 to the Cherokees Congress used the following language:

62 "And that interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate on fifth September, 1850" (9 Stats., 556).

On September 30, 1850, in making an appropriation for the Western Cherokees of $532,896.90, the following language was used:

"And that interest be allowed and paid upon the above sums due, respectively, to the Cherokees in pursuance of the above-mentioned award of the Senate under the reference contained in the said 11th article of the treaty of sixth August, 1846" (9 Stats., 556).

Congress on February 27, 1851, appropriated to the Cherokee Nation the sum of $724,603.37, using the following language:

"And interest on the above sum at the rate of five per centum per

annum from the 12th day of June, 1838, until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated; but no interest shall be paid after the first of April, 1851, if any portion of the money is then left undrawn by the said Cherokees" (9 Stats., 572).

The Western Cherokees, being dissatisfied with the proposed settlement of 1851, sued the United States and recovered judgment. The Supreme Court held that the sum then found due the Western Cherokees was less than should have been found by the amount of $212,376.94, and said:

"It appears to us that the decision of the Senate in respect of interest is controlling, and that therefore interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated" (148 U. S., 478).

63 Interest was calculated upon this judgment at the rate of five per cent from June 12, 1838, to the date of rendition of judgment, June 6, 1893 (54 years, 9 months, and 21 days), making a sum of $583,830.11 for interest, which, together with the principal, made a total of $800,386.31, which was duly appropriated by Congress on August 23, 1894 (28 Stats., 451).

The interest upon the principal found due to the Western Cherokees having been calculated only to June 6, 1893, and said money not having been paid until March 28, 1896, and the resolution of the Senate aforesaid having declared that interest was due on sums found due to said Indians until paid, a demand was made by the Western Cherokees upon the Congress of the United States for the balance of the interest due, to wit, $29,850.74, which was duly appropriated on March 3, 1889, in the the following language:

"That the sum of twenty-nine thousand eight hundred and fifty dollars and seventy-four cents, being the interest at five per centum per annum from June sixth, eighteen hundred and ninety-three, to March twenty-eighth, eighteen hundred and ninety-six, due the Western Cherokee Indians under the award of the United States Senate of September fifth, eighteen hundred and fifty, on the principal sum of two hundred and twelve thousand three hundred and seventy-six dollars and ninety-four cents found to be due them under the decision of the Supreme Court of June 6th, eighteen hundred and ninety-three, is hereby appropriated, to be paid to the authorized agent of the counsel of the Western Cherokee Indians." (Act March 3, 1899, 30 Stats., p. 1235.)

64 The United States, in the light of this unbroken line of precedent, in rendering the account of the Cherokees under the agreement of 1891, ratified by act of Congress March 3, 1893, found, and were obliged to find, that the amount of $1,111,284.70 was due and payable, "with interest from June 12, 1838, to date of payment."

The Supreme Court, in passing on the scope of the Senate resolution of Sept. 5, 1850, in the Western Cherokee case above referred to, said:

"By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed at the rate of 5 per cent per annum upon the sum found due the Western Cherokees from June 12, 1838, until paid. As before stated, our conclusion is that the sum then found due was less than should have been found by the amount of $212,376.94.

"Under section 1901 of the Revised Statutes no interest can be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, and in Tillson vs. United States (100 U. S., 43) it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States which did not expressly authorize such recovery. But in this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself. That determination was arrived at as prescribed, was accepted as valid and binding upon the *the* United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest (9 Stat. L., 556, c. 91).

"In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due it appears to us that the decision of the Senate in respect of interest is controlling, and that therefore interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated." (148 U. S. Reports, 478.) (Decided December 3, 1893.)

65

XXV.

Your petitioners therefore charge that the Eastern Cherokees are in like manner entitled to interest at five per cent per annum from June 12, 1838, until paid, upon the sum which should have been paid to them in 1852, but was wrongfully withheld.

The annual interest upon the sum of $1,111,284.70 amounted to $55,564.23½, and should have been paid to your petitioners at the end of each year when the same fell due, or in default of such payment it should have been invested under the statute of the United States which was passed by Congress on the 11th day of September, 1841 (5 Stats. L., 465, sec. 2), which still remains in full force upon the statutes of the United States as section 3659, R. S., as follows, to wit:

"SECTION 3659. All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum."

Your petitioners insist and charge that the income which had accrued on the 12th day of June, 1843, should have been thus invested, and that each of the sums falling annually due thereafter should have been likewise invested, at not less than five per centum per annum, for the benefit of your petitioners.

XXVI.

Wherefore, in view of all the foregoing allegations of this petition, your petitioners respectfully show, state, and charge that—

66 (1) The findings of Slade and Bender, hereinbefore fully set out, constitute an arbitration and award by which both the United States and your petitioners are bound, and therefore that the United States is indebted to your petitioners in the principal sum of $1,111,284.70, together with interest thereon from June 12, 1838, as more particularly hereinafter set forth.

Your petitioners further charge that in the event the court holds that the accounting of Slade and Bender is not an award, conclusive and binding upon the United States and your petitioners, nevertheless the United States is indebted to your petitioners in the sum of $1,111,284.70, together with interest as hereinafter more particularly set forth, for the reason as stated in finding 5 in the case of the Eastern Cherokees against the United States (Congressional, 10386); that the court adjudged that the sum of $1,111,284.70 had been charged against the five million dollar fund on account of the removal, and which charge your petitioners aver was unlawfully made.

Your petitioners further charge in the alternative, that the United States is indebted to them in the sum of $1,761,457.27, with interest thereon, as hereinafter more particularly set forth, for the following reasons, to wit: That the Eastern Cherokees emigrated themselves, and by article 8 of the treaty of 1835–36 the United States had no right to take credit for such removal and subsistence in excess of the rate of $53.33 per capita for each of the said Cherokees, numbering 16,957 persons, found by the Supreme Court of the United States to have been
67 removed (Western Cherokees against the United States, 147 U. S., 427), being the sum of $904,316.81. The United States, in fact, took credit for the sum of.... ..... $2,952,196.26

(Sen. Doc. 215, 56th Cong., 1st sess., p. 87.)

on account of removal and subsistence, reimbursing on February 21, 1851, the sum of	$96,999.42	
and on September 39, 1850.....	189,422.76 (ibid.)	
A total of.....	$286,422.18	$286,422.18
Leaving a balance of.....		$2,665,774.08
When only entitled to a credit as above set forth on account of removal and subsistence in the sum of.....		$904,316.81
Leaving a balance due the Eastern Cherokees of.		$1,761,457.27

Your petitioners therefore charge in the alternative that instead of the sum of $1,111,284.70 found by Slade and Bender, the amount of $1,761,457.27 is due them by the United States with interest, as hereinafter more particularly set forth.

(2) If the said accounting of Slade and Bender should be held by the court to constitute an award by which both the United States and your petitioners are bound, then the statement of that award that interest is due on said amount from June 12, 1838, does not preclude your petitioners from but compels your petitioners to insist on demanding judgment upon a calculation of interest in the manner prescribed by law.

68 Your petitioners therefore charge that interest should be calculated upon the principal sum found due them at the rate of five per cent per annum from the 12th day of June, 1838, until paid.

(3) They further charge that the income which had accrued up to June 12, 1842, upon whatever principal sum may be found by the court due your petitioners should bear interest from June 12, 1842, at the rate of not less than five per cent per annum, until paid, in pursuance of the statute of September 11, 1841 (5 Stat. L., 465).

(4) They further charge that they are entitled to recover interest at the rate of five per cent per annum, until paid, upon the annual income

accruing upon whatever principal sum is found by the court to be due them, and which was payable on June 12, 1843, and upon the annual income so accruing on June 12th of each succeeding year, from the dates when severally due until the time when such several annual incomes so due shall have been paid.

That is to say:

Your petitioners charge that they are entitled to receive—

a. The principal sum unlawfully withheld.

b. The interest on said principal sum from June 12, 1838, until paid.

c. The interest on four years' income on the principal sum for the years 1839, 1840, 1841, 1842, from June 12, 1842, until paid.

d. The interest on the annually accruing income on such principal sum from the dates when so due and payable, beginning with June 12,
69 1843, and extending to the present, until such annual income for such years severally referred to shall have been paid.

(5) That the Cherokee Nation, as a political body, is not entitled to maintain the action which is the subject of this petition, first, because the Cherokee Nation is not the owner of this claim; second, because the Cherokee Nation, if ever in any capacity the representative of your petitioners, is not now their representative; third, because the Cherokee Nation has been dismantled as a body politic, and has no authority either to receive or to disburse funds, and because the Cherokee Nation may be actually nonexistent when judgment is finally rendered in this cause; fourth, because the Cherokee Nation, if ever the representative of your petitioners in any capacity of trust or otherwise, has forfeited whatever rights it may have had as such representative by laying claim to this fund as the property of the nation itself and not as the property of your petitioners and in contravention of the rights of your petitioners; fifth, because the Cherokee Nation, if ever the representative in any capacity of your petitioners, has, by its gross laches and unpardonable negligence, forfeited all right or claim to represent your petitioners in the matter of this claim; sixth, because it has been, by this honorable court in the case of The Eastern Cherokees vs. The United States, No. 10386, adjudged that the parties claimant in the matter of this claim were the Eastern Cherokees and not the Cherokee Nation, and, finally, because the Congress of the United States, being fully advised in the premises, has
70 authorized by special act your petitioners to appear in this honorable court and institute this suit for the protection and adjudication of their own rights, who have, therefore, full capacity to institute and maintain this action in their own behalf and expressly as against the Cherokee Nation.

PRAYERS.

In consideration of the premises, your petitioners respectfully pray—

1st. That under and by virtue of the act of Congress hereinbefore cited they have leave to file this their petition.

2d. That under and by virtue of the said act of Congress the Cherokee Nation be made a party defendant hereto, and that the court direct the issuance of its process for that purpose and require the said defendant, the Cherokee Nation, to appear and answer this petition, or otherwise defend within sixty days from the date of its filing.

3d. That your petitioners have a judgment of this court declaring that

the account rendered by Messrs. Slade and Bender, hereinbefore particularly set forth, constitutes an award binding both upon the United States and your petitioners, and that your petitioners have judgment accordingly; or, in the alternative, that if this honorable court should hold said finding of Slade and Bender not to be an award binding upon the United States and your petitioners, your petitioners have judgment against the United States for the amount found to have been unlaw-
71 fully withheld from your petitioners, and that in either event the judgment in favor of your petitioners shall include interest computed upon the principal sum in accordance with the allegations of Paragraph XXVI.

Your petitioners pray also for general relief.

EASTERN CHEROKEES,
By ROBT. L. OWEN,
Attorney.

R. V. BELT,
ROBT. L. OWEN,
SCARRETT & COX,
W. T. CRAWFORD,
Attorneys.

W. H. ROBESON,
M. C. BUTLER,
Of Counsel.

THE NORTHERN JUDICIAL
DISTRICT OF INDIAN TERRITORY, *ss:*

This day personally appeared before me the undersigned authority, Frank J. Boudinot, and having been first sworn in due form of law, deposes as follows:

I am one of the three members of the Executive Committee of the Council of the Eastern Cherokees; I have carefully read the foregoing petition, in company with my fellow committeemen, David Muskrat and Daniel Gritts, at whose request I make this verification. The allegations of the foregoing petition are true to the best of my knowledge, information, and belief.

FRANK J. BOUDINOT.

Subscribed and sworn to before me this day of March, 1903.

Notary Public.

My commission expires

72 DISTRICT OF COLUMBIA,
City of Washington, ss:

This day personally appeared before me, the undersigned authority, Robert L. Owen, and having been first sworn in due form of law, deposes as follows:

I am one of the attorneys representing the petitioners, the Eastern Cherokees, and have carefully read the foregoing petition. The allegations thereof are true to the best of my knowledge, information, and belief.

ROBERT L. OWEN.

Subscribed and sworn to before me this 13th day of March, 1903.

[SEAL.]

L. M. FOX,
Notary Public.

My commission expires May 10, 1907.

THE CHEROKEE NATION
v.
THE UNITED STATES. } No. 23199.

THE EASTERN CHEROKEES
v.
THE UNITED STATES. } No. 23214.

THE EASTERN AND EMIGRANT CHEROKEES
v.
THE UNITED STATES. } No. 23214.

V.—Motion to consolidate and to require the production of authority, and order thereon, filed January 7, 1904.

Come now the defendants, by their Attorney-General, and show and exhibit unto the court that under the provisions of section 68 of the act of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation and for the disposal of the town sites therein, and for other purposes" (32 Stat. L., 716), and under the provisions of the act of March 3, 1903, entitled "An act making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1904, conferring jurisdiction upon this court to hear and determine certain claims alleged to exist on the part
73 of the Cherokee Nation and various bands or tribes thereof against the United States, there has been filed in this court the suit of the Cherokee Nation and docketed as No. 23199; the suit of the Eastern Cherokees and docketed as No. 23214; the suit of the Eastern and Emigrant Cherokees, docketed as No. 23212.

And the defendants further show and exhibit to the court that the causes of action in all of the aforesaid suits relate to the same subject-matter and can be most conveniently and expeditiously determined by a consolidation of the three suits.

And the defendants further show and exhibit unto the court that under the acts of Congress first above referred to it is made the duty of the court to determine which, if any, of the parties plaintiff are entitled to the money sued for, and it is also made the duty of the court by such orders or process as the court may deem proper to require all parties in interest to appear and submit themselves to the jurisdiction of the court, in order that the cause at issue may be fully determined.

Now, therefore, in consideration of the premises, the defendants pray:

I. That the aforesaid causes of action be consolidated and heard together as one cause.

II. That all the parties plaintiff in the above-entitled causes be required, by order of this court, to submit to the court for its inspection, approval, or disapproval the powers of attorney, or such other authority upon which the claimants, or the attorneys thereof, rely for authority to present their claims in this court under the aforesaid acts of Congress.

LOUIS A. PRADT,
Assistant Attorney-General.

GEO. H. GORMAN,
Special Attorney.

74 ORDER OF COURT.

It is ordered on the within motion that the claimants in the several suits, to wit, The Cherokee Nation, No. 23199; The Eastern Cherokees, No. 23214, and the Eastern and Emigrant Cherokees, No. 23212, be required to interplead, and that the above-entitled cases be consolidated and brought to trial as one case without prejudice to the several rights of the parties claimant;

And it is further ordered that upon the hearing of the several causes on the merits, or at such other time as the court may direct, the attorney appearing for the Cherokee Nation, the Eastern Cherokees, and the Eastern and Emigrant Cherokees be required to submit to the court the power of attorney or other authority upon which they rely to bring said suit, and to establish by proof or argument or otherwise, as the court may direct, the sufficiency of such power of attorney or other authority to bring into court the respective parties plaintiff.

March 7, 1904.

BY THE COURT.

75 THE CHEROKEE NATION vs. THE UNITED STATES. } No. 23199.

VI.—The intervening petition of the Eastern Cherokees in the case of The Cherokee Nation vs. The United States, No. 23199, filed under the order of the court—filed February 14, 1905.

Now come the Eastern Cherokees, under the direction of the court, to interplead in the case of The Cherokee Nation vs. The United States, No. 23199, and showing to the court that they have heretofore instituted an independent suit against the United States and the Cherokee Nation, being No. 23214, for the recovery of the certain item hereinafter referred to, the right to a recovery for which is in dispute between themselves and the Cherokee Nation, and protesting that in said suit the controversy between themselves and the United States and the Cherokee Nation regarding said item is fully set out and should be determined, respectfully state that the Eastern Cherokees are in accord with the Cherokee Nation as follows:

"That the United States is in duty bound to pay the amount found due in the account rendered by the United States April 28,

76 1894."

The Eastern Cherokees agree that the first, third, and fourth items found due by the United States in the account rendered are due the Cherokee Nation as a body politic.

The Eastern Cherokees deny that the second item, to wit, $1,111,284.70, with interest at five per cent from June 12, 1838, to date of payment, is due the Cherokee Nation as a body politic, but allege on the contrary that that fund is the balance of the amount due under the 9th article of the treaty of 1846 and the 15th article of the treaty of 1835 to the persons therein described, to wit, to the Eastern Cherokees per capita; that the Cherokee Nation, in securing the accounting under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees referred

to, and for their exclusive use and benefit, and that if it had collected such money such money would be in its hands an implied trust for the benefit of the equitable owners, to wit, the Eastern Cherokees.

The Eastern Cherokees for further answer state that Slade and Bender (page 84 of the record No. 23214) distinctly state, in making a tabulation of the balance due under the 9th article of the treaty of 1846, as follows:

Balance to be distributed per capita	$2,025,310.83
Deduct amount actually distributed as already explained	914,026.13
Balance due	1,111,284.70

The Eastern Cherokees for further answer state that the Cherokee national council itself, on December 7, 1900, in an act approved on that day by Hon. Thomas M. Buffington, principal chief of the Cher-
77 okee Nation, heretofore filed in this court, expressly conceded the right of the Eastern Cherokees in the following language:

"Be it further enacted, that all moneys which may be collected belonging to the five-million-dollar treaty fund of 1835 shall be paid out per capita when collected to the persons entitled thereto, as set forth in the 9th article of the treaty of 1846."

The Eastern Cherokees, further answering, pray that their briefs, arguments, and reply briefs, in the case of The Eastern Cherokees vs. The United States, No. 23214, be considered as filed in this case now consolidated under the order of court of March 7, 1904.

Respectfully submitted.

OWEN AND BELT,
ROBERT V. BELT,
Attorneys of Record.

February 14, 1905.

WILLIAM H. ROBESON,
Of Counsel.

78 THE CHEROKEE NATION
vs.
THE UNITED STATES. } No. 23199.

III.—*Replication of the Cherokee Nation to the intervening petition of the Eastern Cherokees in the case of The Cherokee Nation vs. The United States, filed February 14, 1905.*

Now comes the Cherokee Nation and for replication to so much of the intervening petition of the Eastern Cherokees as it is advised should be answered, says:

1. It denies that the Cherokee Nation in securing the accounting under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees referred to, and for their exclusive use and benefit; and further denies that if it had collected or hereafter shall collect such moneys, the same would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees exclusively or otherwise.

2. The Cherokee Nation denies that any such act of the Cherokee national council as is referred to and described in said intervening petition,

ever was enacted into law, but on the contrary says that the resolution of the Cherokee national council referred to was expressly disapproved by the President of the United States in the exercise of his supervisory powers under the law in such respect provided and hence never had any validity.

FINKELNBURG, NAGEL AND KIRBY,
EDGAR SMITH,
Attorneys for the Cherokee Nation.

79 THE EASTERN AND EMIGRANT CHEROKEES
v.
THE UNITED STATES. } No. 23212.

VIII.—Intervening petition of the "Eastern Cherokees," filed under order of the court February 14, 1905.

Now come the "Eastern Cherokees," having the status of a band, and under the express authority of the act of Congress of March 3, 1903, authorizing said "Eastern Cherokees to prosecute" suit against the United States, "through attorneys employed by their proper authorities," such authority having heretofore been filed in this honorable court, and respectfully state that the Eastern Cherokees, under the authority of the act aforesaid, have heretofore brought suit under the title of the Eastern Cherokees against the United States, No. 23214; that the suit brought under the caption of The Eastern and Emigrant Cherokees vs. The United States, No. 23212, is brought on behalf of certain individuals who claim to be Eastern Cherokees or Emigrant Cherokees, but who are not authorized to bring suit under the act of Congress of March 3, 1903, or under any other act. The Emigrant Cherokees are Eastern Cherokees who have emigrated to the Cherokee Nation in Indian Territory, called by a local epithet. The Eastern Cherokees intervening by this petition are not informed as to the right of the individuals bringing suit under the designation of the Eastern and Emigrant Cherokees, in suit No. 23212, to be designated as Eastern and Emigrant Cherokees, there being
80 no proper proof submitted beyond the claim of the individuals themselves. They therefore deny that such persons are Eastern Cherokees, and they deny that such persons have any right to bring suit under the act of March 3, 1903; but allege on the contrary that the Eastern Cherokees, with the authority to bring suit in this honorable court as a band or bands, are already in court as one band, by attorneys employed by the proper authorities of the Eastern Cherokees of Indian Territory and the Eastern Cherokees east of the Mississippi, who have heretofore by their proper authorities employed counsel to represent the Eastern Cherokees as a body.

Your intervenors respectfully allege that there is no occasion for the bringing of the suit of The Eastern and Emigrant Cherokees vs. The United States, No. 23212, because the rights of the Eastern Cherokees have been fully set up in the manner provided by the statute in the case of The Eastern Cherokees vs. The United States, No. 23214, while the case of The Eastern and Emigrant Cherokees vs. The United States, No. 23212, is not brought in pursuance of any statute, and has no further

right upon the record of this honorable court than then thousand similar suits might have, if each individual Eastern Cherokee should bring his independent action, which was not contemplated by Congress and is not authorized by law.

Respectfully submitted.

OWEN AND BELT,
ROBERT V. BELT,
Attorneys of Record.

WM. H. ROBESON.

February 14, 1905.

81 THE EASTERN AND EMIGRANT CHEROKEES
vs.
THE UNITED STATES. } No. 23212.

IX.—Answer to intervening petition of the Eastern Cherokees in the above cause claiming to have been filed by order of court February 14, 1905.

1. The Eastern and Emigrant Cherokees in this cause number five thousand five hundred persons, more or less, partly in communities, and partly scattered in North Carolina, Georgia, and Tennessee—citizens of the States in which they reside, and many of them in the Indian Territory—wards of the nation, and in Missouri; not claiming to be organized as a band, but each having an individual financial interest in the subject-matter of this suit, either personally or through their ancestors as Cherokees under the treaties of 1835 and 1846, who were owners of the land, the sale of which constituted the Five Million Fund.

82 2. This suit is brought under authority granted by acts of Congress of March 3, 1903, and of July 1, 1902, allowing the Court of Claims to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, they having previously intervened in suit No. 10386, Congressional, for a finding of facts with reference to the same subject-matter, and appeared before Congress by their attorneys for the enactment of special legislation to enable claimants to litigate their suit, said enactment having been narrowed somewhat by the influence of these intervenors in their own interest.

3. It is brought on the behalf of individual claimants because the treaties stipulate that the money, when paid, shall be paid to the individuals per capita, and because these individuals for the most part are citizens and not required to bring suits under sections 2103 and 2106 U. S. R. S., and because there is no band of Eastern Cherokees distinct as such, either in the States east or in the Indian Territory, the so-called Eastern Band of North Carolina Cherokees having been reduced to a small radius, and for purposes of business formed into a corporation and comprising only a small portion of the Cherokees in the States; while the Eastern Cherokees in the Indian Territory have no separate exist-

83 ence as a band or tribe, but are very largely incorporated in the so-called Cherokee Nation, which will expire by limitation on the 4th of March, 1906.

4. The Eastern and Emigrant Cherokees, designated in this suit, are Cherokees residing in States east of the Mississippi River and portions of their families, Cherokees who have removed west to the Indian Territory who for many reasons have not been incorporated into "The Nation," so called, but all of Cherokee blood, and whose designation "Eastern and Emigrant Cherokees" is an old established one, and will be found on nearly all of the papers designating reservations of the Cherokees east, and are the persons whose lands were sacrificed in the treaties of 1828 and 1835 for their removal west.

5. The parties herein brought their independent suit before the filing of the suit of these intervenors, as will be seen by the numbers of the two cases as set forth by them, and without having been informed that it was necessary to secure permission of these intervenors to bring said suit.

6. The parties to this suit deny either that they are represented by, or that they have authorized representation by, the intervenors herein or their attorneys. They have filed this suit because they are not so represented for the most part and desire to be placed on the new pay rolls that they may receive their pro rata, having received nothing
84 from the $8,500,000 paid for the Oklahoma strip, or for any of the sales of western lands.

7. We deny that these intervenors are in court in strict accordance with either of the statutes referred to, or that there has ever been any act of union between the Eastern or North Carolina Cherokees and the Eastern Cherokees in the Indian Territory, or that they have, since the removal west of the latter, acted together as a band, or that the parties as a whole in this intervention have any status as a band. The court has allowed, under the act, all of the parties in interest to come in, and has requested them to interplead.

BELVA A. LOCKWOOD,
Attorney for Eastern and Emigrant Cherokees.

85 In the Court of Claims of the United States, Term A. D. 1904–1905.

THE CHEROKEE NATION *vs.* THE UNITED STATES.	No. 23199.	Consolidated.
THE EASTERN & EMIGRANT CHEROKEES *vs.* THE UNITED STATES & THE CHEROKEE Nation.	No. 23212.	
THE EASTERN CHEROKEES *vs.* THE UNITED STATES & THE CHEROKEE Nation.	No. 23214.	

X.—General traverse, filed February 14, 1905.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every

allegation therein contained, and asks judgment that the petition be dismissed.

LOUIS A. PRADT,
Assistant Attorney-General.

86 *XI.—Argument and submission of consolidated cases Nos. 23199, 23212, and 23214.*

These consolidated cases came on to be heard upon the pleadings, orders, and proofs, and on February 14, 15, 16, 20, and 21, 1905, were argued by Messrs. Charles Nagel, Edgar Smith, and Frederic D. McKenney, on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson, on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood, on behalf of certain individual claimants, styled Eastern and Emigrant Cherokees, and Mr. Assistant Attorney-General Pradt, on behalf of the United States, and submitted.

87 XII.—*Opinion of the court, and concurring and dissenting opinions, filed March 20, 1905.*

THE CHEROKEE NATION
v.
THE UNITED STATES. } No. 23199.

THE EASTERN CHEROKEES
v.
THE UNITED STATES. } No. 23214.

THE EASTERN AND EMIGRANT CHEROKEES
v.
THE UNITED STATES. } No. 23212.

OPINION.

NOTT, Ch. J., delivered the opinion of the court:

In December, 1891, the United States and the Cherokee Nation entered into an agreement for the purchase and sale of a great tract in the Indian Territory known as the Cherokee Outlet. At the time of this negotiation the Cherokees had a grievance against the United States—a grievance which had burned in the breasts of two generations, and had never been forgiven or forgotten. That grievance was the treaty of 1835, commonly known as the treaty of New Echota—the corrupt method by which it had been procured, the ruthless means by which it had been executed, and the evasive way in which its obligations had been left unfulfilled. The history of this treaty and its consequences have been examined and set forth by this court, and need not be repeated here. (Western Cherokees v. United States, 27 C. Cls. R., 1.) It is enough to say that "the treaty of New Echota was the act and deed of neither the Eastern nor Western Cherokees," and that neither the Cherokee people nor the Cherokee government ever acknowledged it. In the words of Ross, they said in a memorial to Congress, December 15, 1837: "We

complain of sending among us a large armed force, of the attempts made to prevent the expression of opinion among us, of the arrest and imprisonment of our persons, of the expulsion of our people from their homes; for which even the document in question furnishes no ground or cause. All these, however, sink into insignificance when compared with the one overwhelming calamity, present and prospective, of having the instrument of December, 1835, enforced upon us and our people."

88 And in that remarkable petition submitted to Congress, bearing date February 22, 1838, signed by 15,665 of the Cherokee people, the whole nation reiterated, "We do solemnly and earnestly protest against that spurious instrument."

But while the Cherokee people always maintained that the treaty of New Echota was falsely executed in their name by a few unauthorized, unofficial persons, corruptly suborned by an agent of the United States, they nevertheless were compelled by the condition of affairs in the Cherokee country and by the overwhelming power of the United States to, in a measure, adopt it through the instrumentality of the Cherokee treaty of 1846 (9 Stat. L., p. 871). Of it this court has said:

"That treaty was a compact between three parties—the United States, the Eastern and the Western Cherokees. Its purpose was to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be, and to secure peace in the Cherokee country. The principle upon which it sought to accomplish this purpose was, that, on the one hand, the Western Cherokees should participate in the purchase money which had been paid for the lands east of the Mississippi, and, on the other, that they should abandon their autonomy and become subject to the government which had been established by the Eastern Cherokees.

"The reason behind the principle was that in 1835 the Western Cherokees owned the Cherokee country west, and had paid for it, and that the Eastern Cherokees acquired by the terms of the treaty of New Echota two-thirds of this without paying for it, and at the same time retained all of the purchase money which had been given for their possessions east of the Mississippi. A portion of this purchase money had been expended for the use of the Eastern Cherokees and a portion continued to be held as a trust for their benefit; the remainder had been paid to them per capita.

"If their removal had been effected on the same terms as that of the Western Cherokees, under the treaty of 1828, they would have received land in the Indian Territory in exchange for land east of the Mississippi.

"As it was, they had received both land and money; but the land was the land of the Western Cherokees. Strictly, the Government should have paid the Western Cherokees for the lands thus appropriated, and should have deducted the price from the money paid to the Eastern Cherokees. It was now sought by the treaty of 1846 to accomplish this in an indirect way; the Western Cherokees were to be admitted ab initio to a quasi partnership or joint ownership, by the terms of which they were to contribute the land in the Indian Territory and share in the proceeds of the land east of the Mississippi.

"By the terms of this arrangement the Eastern Cherokees consented to their sharing in the purchase money so far as it was still held by the United States in the form of trusts and annuities; and the United States

agreed that so far as it had been paid away to individual Indians and could not be restored they should pay it over again, and thus make good to the Western Cherokees their rightful proportion in the fund." (Western Cherokees v. United States, 27 C. Cls. R., 1, 36.)

Having thus become indirectly and unwillingly parties to the treaty of New Echota the Eastern Cherokees, nevertheless—that is to say, all of those Cherokees who were divested of their lands east of the Mississippi by the treaty of New Echota in 1835—have steadfastly and
89 persistently maintained that that treaty, harsh and inexorable as it was, has never been carried into effect according to the true import and ostensible intent of its provisions.

In 1891 the Cherokee people and the United States were confronting each other for the last time as vendors and purchasers of land. The Cherokee Outlet was then the last remnant of territory to be ceded, and in a few years the autonomic government of the nation was forcordained to cease. The Cherokee commissioners were true to their people and their fathers in demanding as a condition to the cession and as an addition to the specified consideration for the grant ($8,300,000) that all of the past treaty transactions between the United States and the Cherokee Nation should be reopened; that their demands should be reconsidered; that the moneys which might be equitably and justly due to them should be paid, and that in the final determination of these matters they should have, if they desired it, access to the judicial tribunals of the United States. These demands were acceded to by the Government of the United States, and were ratified and approved by Congress (27 Stat. L., p. 640, § 10). They found expression in the following formal agreement:

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall, at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or, if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting."

There was at the time when this agreement was *entered into no understanding* or supposition as to how the United States should render the account called for. The representatives of the United States did not themselves know. This is shown incontestably by the fact that soon afterwards the Commissioner of Indian Affairs, in response to some inquiry, reported to the Senate:

"I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation, under the treaties therein specified, and under
90 the various appropriation acts passed to carry the same into effect, this account could be prepared by this office within a reasonable time—say, about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant."

Congress adopted the latter alternative, and, by the act 3d March, 1893 (27 Stat. L., pp. 612, 643, § 10), appropriated $5,000 to enable the Commissioner "to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due," etc. Two accountants were selected by the Commissioner of Indian Affairs (Messrs. James A. Slade and Joseph T. Bender), who, after a prolonged examination, in 1894 handed in their account. It resulted in allowing three items of trifling amount, which the United States conceded, and in disallowing items which the Cherokee Nation claimed; and on the great and important subject in dispute—the treaty of New Echota—it found a balance of $1,111,284.70, and it allowed interest upon this balance from June 12, 1838. The account sets forth items and amounts and facts and reasons and conclusions, much in the form of an award; and it is not surprising that it was regarded by some persons as such and by other persons as having been intended to be such by the accountants. But the agreement did not provide that the account should be made by any specific person mutually agreed upon as umpire, or by clerks or accountants or auditors or arbitrators. All that it says is that "the United States shall, without delay, render to the Cherokee Nation a complete account." It is the United States, one of the parties, which is to do this, and not an intermediary agreeable to both parties. The United States are left free to make up the account in any manner they please; and the account, when rendered, will not be conclusive or prima facie for or against the Cherokee Nation. The one thing that is certainly assured to the nation, and the only thing, is that the account will be the portal through which the Cherokee Nation can carry the rights and the wrongs of its people into a judicial forum.

At this point the uncertainties and the controversies of the case begin. When the account came in (April 28, 1894) the Secretary of the Interior

(who occupies the same position with regard to Indian nations and tribes that the Secretary of State does with regard to foreign nations) transmitted it (May 21, 1894) to the Cherokee Nation. The nation accepted it (December 1, 1894) and signified their acceptance, thereby waiving the items which the accountants had disallowed and its right to carry those rejected items into the courts of the United States. On January 7, 1895, the Secretary of the Interior transmitted the account, together with the acceptance of the Cherokee Nation, to the House of Representatives.

Congress did not make the appropriation in the manner prescribed in the agreement—"Such appropriation to be made by Congress if then in session, and if not, then at the session immediately following
91 such accounting"—but, on the contrary, did nothing. At the end of the session the House of Representatives, on the 2d of March, 1895, called on the Attorney-General for an opinion concerning the conclusions reached by the accountants. The Attorney-General made his reply at the beginning of the next session, in December following. The second session, "the session immediately following such accounting," passed without Congressional action of any kind. On the 20th of February, 1901, the Senate transmitted to the Court of Claims a bill calling for a report of the facts. On April 28, 1902, the court transmitted to the Senate its findings of fact under such reference, but expressed no opinion upon any question of law. Not until the 1st of July, 1902, did Congress act, and their action was merely passing the jurisdictional statute under which the court is now acting. (32 Stat. L., p. 716.)

On the trial of this case the arguments extended over a very wide range of fact and law, going back to the treaty of New Echota and coming down to the questions whether the account of Messrs. Slade and Bender could be considered as an award or as an account stated.

In the opinion of the court the account can not be regarded as an award; in the opinion of the court it does not have one element of an award. An award is the result of an examination in some form or other by a person mutually agreed upon. In building contracts courts have constantly before them stipulations that certain things shall be decided by the architect, or by the engineer in charge, whose decision shall be final. Such awards, within proper limitations, are to be upheld. But in the agreement now before us there is not so much as the suggestion of a person who shall act as umpire or of a matter to be submitted to him. All that the agreement requires, as before has been said, is that one of the parties, the United States, shall render to the other their account. How they shall render it, in what form they shall render it, to what extent they shall render it, is left entirely to themselves. It is to be the account of the United States, and not the account of some person acting for both parties. Before there can be an award, having the element of finality, there must be something mutually submitted to somebody. Such was not the case here.

Neither can the court regard it as an account stated. An account stated is something arising in the ordinary course of business between men having continuous business transactions. When one of them, the creditor, makes out an account and the other, the debtor, accepts it, an action will lie upon it. The acceptance may be express or implied. If

the one sends it and the other raises no objection to it within a reasonable time, the law merchant holds that he assents to it; and then, if he did not object when he should have objected, that he will be estopped from objecting. The account rendered then becomes an account stated, from which the law will imply a promise to pay the balance appearing to be due, and upon which an action may be brought. The Slade and Bender account does not contain these elements. It is the creditor and not the debtor who furnishes an account stated; it is the debtor and not the creditor who must assent to it. This account was merely "rendered" and by the debtor, and under a specific agreement which provides what shall be done with it. The question is not whether it was or was not an account stated, but what may be the liabilities of the parties under the specific agreement.

92 But while the account was neither an award nor an account stated, it must be conceded that the scope of the accounting was intended to be as broad as the causes of action secured by the agreement to the Cherokee Nation—"the right within twelve months to enter suit against the United States in the Court of Claims for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting." That is to say, the court, or the accountants, were to go behind statutory and treaty bars and receipts in full and were to consider "any alleged or declared amount of money promised but withheld" "under any of said treaties or laws." This meant that there were to be no technical defenses set up, no pleas of res judicata, no releases or relinquishments, compromises or settlements, or it meant nothing. For if the proposed suit of the Cherokees was to be decided strictissimi juris, i. e., upon technical defenses, it had already been decided against them.

That decision was not against the Cherokee Nation, but it was against Cherokee citizens. The Cherokees have maintained from the first and always that to make them pay for their removal from homes which they did not wish to leave to a country to which they did not wish to go was a monstrous abuse of the obscure provisions of a treaty which they had not read, which they had not signed, and to which they had not in fact been parties. "Immediately before, and up to the time of the eviction of the Cherokees, the Government had been carrying on a negotiation with their delegates who had submitted certain propositions looking toward a new treaty. On the 18th of May, 1838, Mr. Poinsett, Secretary of War, communicated his objections of them to the delegates, but at the same time made to them an offer, the substance of which was that if the Cherokees would 'remove peaceably and contentedly to their new homes in the West' the United States would defray the expenses of their removal and subsistence. This offer bears date only five days before the eviction began. It was not accepted by the Cherokees, but seems to have been tacitly acquiesced in, they removing peaceably if not contentedly, and subsequently claiming that the cost of removal and subsistence should not be borne by themselves." (Western Cherokees v. United States, 27 C. Cls. R., 1, 44.) Yet the court was obliged in that case to hold, according to the letter of the law (the treaties, the statutes, the acquit-

'ances), that the cost of removal was to be a charge upon the $5,000,000 treaty fund and to be borne by the Cherokees. It is manifest that the agreement, here, intended something more than that the Cherokees might come into court to be immediately turned out under previous decisions. Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them so to believe) that all of their claims and rights and equities were to be reopened and reexamined de novo; and that upon the faith of that belief they made a cession of the Outlet.

In the opinion of the court this case is simply one to recover purchase money upon a contract of sale. Ordinarily, in such a case, the cession would not be made, the deed would not be delivered until the purchase money is paid or secured or, at least, the amount be ascertained and liquidated. In this case both parties wanted to expedite the transaction. It was important for the United States that the cession of the territory should be made immediately; it was desirable for the Cherokee Nation that the purchase money should be paid soon. But, nevertheless, the Cherokee Nation had the right to immediate payment, and the agreement intended to secure to them the next thing to it—the right to an early payment. The accounting was merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This is not the case of a party prosecuting an unliquidated debt, but a case of sale and delivery and nonpayment of the purchase money for the thing sold and delivered. The United States were willing to pay; the Cherokee Nation wanted the payment made at the earliest possible day; both parties agreed upon a method by which it should be paid as nearly immediately as was possible. The United States were to render their account "without delay;" if the Cherokee Nation accepted it the amount was to be appropriated by Congress; such "appropriation was to be made by Congress, if then in session, and if not, then at the session immediately following such accounting." If the Cherokee Nation did not accept the accounting, or regarded it as incorrect or unjust, and carried it into the courts and recovered a judgment, Congress was to appropriate "at its next session after such case shall be finally decided." Nothing was left to the ordinary uncertainties and procrastinations of legislation, and no agreement could have made the obligation to pay promptly more unequivocal and specific. Time was of the essence of the contract, so far as the words of the parties could make it.

93

The court does not intend to imply that when the account of Slade and Bender came into the hands of the Secretary of the Interior he was bound to transmit it to the Cherokee Nation. On the contrary, the Cherokee Nation had not agreed to be bound by the report of the accountants and could not claim that the United States should be. The accountants were but the instrumentality of the United States in making out an account. When it was placed in the Interior Department it was as much within the discretion of the Secretary to accept and adopt it or

to remand it for alterations and corrections as a thing could be. He was the representative of the United States under whom the agreement had been made, and he was the authority under which the account had been made out; and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States. When the account was thus received by the Cherokee Nation (May 21, 1894) the "twelve months" of the agreement, within which the nation must consider it and enter suit against the other party in the Court of Claims began to run; and with the nation's acceptance of the account (December 1, 1894), the session of Congress at which an appropriation should be made became fixed and certain. The Secretary did not recall the account; the United States never rendered another; and the utmost authority which Congress could have have exercised, if any, was at the same session, or certainly within the prescribed "twelve months," to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary of the Interior, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time within
94 which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament; and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement.

When the agreement is analyzed it seems plain that if the court were to uphold the course which the United States have pursued it would have to adopt one of two alternatives: Either it would have to read into the agreement provisions which are not there and which are the converse of those which are there (that it was the Cherokee Nation, and not the United States, which was to render the account; that it was the United States, and not the Cherokee Nation, which might object to the account; that it was the United States, and not the Cherokee Nation, to whom judicial redress was given), or it would have to hold that the agreement promised nothing, assured nothing, gave no judicial means of redress, and left the Cherokee Nation in precisely the same plight that it would have been in if no agreement had been made, to wit, with a controversy of nearly seventy years still unsettled.

The question which next arises relates to the contending parties before the court—the Cherokee Nation being the Cherokee government, the Eastern Cherokees being the communal owners.

The contracting party here, being also the party who made the conveyance of the Cherokee Outlet, was the Cherokee Nation; and if the lands of the Cherokees were, like the lands of the United States, Government lands, or public lands in which the Government has the sole proprietary interest and in which no individual has any personal interest whatever, there could not be a doubt of the exclusive right of the Cherokee Nation to have a judgment awarded in its name. But in 1835 the lands of the Cherokees east of the Mississippi, and in 1846 the lands of the Cherokees in the Indian Territory, were neither public nor private lands in the ordinary sense of those terms. The term "communal," it is believed, is not to be found in treaties or statutes or public documents

relating to the Indians prior to the date of the case of the Western Cherokees (27 C. Cls. R., 1). But the officers of the Government, under stress of circumstances—that is to say, the expectations of the Indians—have always treated Indian lands as communal, though they did not use the term and had very dim perceptions as to the nature of the estate. Whenever the Government has paid for a cession of Indian land per capita to every member of an Indian community, share and share alike, it was because the Indians knew that their lands were communal property and that they, as communal owners, were entitled to the purchase money. The case of the Western Cherokees (supra) is so nearly identical to the present one as regards the parties claimant that the opinion in that case correctly sets forth the facts and the law of the present one:

"The lands east of the Mississippi were not vested in the Cherokee government as distinguished from the Cherokee people. Their chiefs in council, as representative of the body politic, might, perhaps, have sold or disposed of them, but under their constitution and laws could not have brought an action of trespass or ejectment against one of their own citizens for dwelling upon or hunting over the lands. The title was not vested in the Cherokees as individuals. They were neither tenants in common nor joint tenants. The individual Cherokee had no vested right which he could convey or devise or make the subject of a suit in partition. It he withdrew from the community
95 he left all rights behind him, and if a stranger was admitted he acquired a right by virtue of his admission alone. The property was communal—a property wherein every person, not as an individual, but as a member of the community, held an equal, indistinguishable, indivisable right of user, and nothing more." (Western Cherokees v. United States, 27 C. Cls. R., 1, 53.)

The present case is also complicated by the fact that a considerable portion of these communal owners are neither citizens of the Cherokee Nation nor subject to its jurisdiction nor dwellers within its territory, but are and always have been residents of territory east of the Mississippi, owing allegiance now exclusively to the United States. It is also complicated by the fact that the account rendered by the United States to the Cherokee Nation is made up of four distinct and essentially different items: One, the chief one, is for money erroneously charged to the Cherokees instead of being divided per capita among them; another is for money which should have been added to the principal of the school fund, a fund which is held by the United States in trust; a third is for money improperly charged to the Cherokee national fund, likewise held in trust by the United States. Only one appears to be money properly due to the Cherokee Nation as a government, and that for the inconsiderable amount of $432.28. The case is further complicated by the fact that the government of the Cherokee Nation is passing away; that it has already ceased to possess a judiciary, and that on the 4th of March, 1906, it will, to all intents and purposes, expire.

The action instituted in this court by the Cherokee Nation was properly an action at law to recover a liquidated amount of money upon an express contract. But the act 1st July, 1902 (32 Stat. L., p. 716, §68), under which it was instituted, authorized the court to adjudicate any claim which the Cherokee Nation "or any band thereof" might have

against the United States, with "full authority by proper orders and process to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy." The supplemental act 3d March, 1903 (32 Stat. L., p. 996), expressly authorized "the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River," to come in and prosecute their claims, with power to the court "also to determine as between the different claimants, to whom the judgment so rendered equitably belongs." The case, then, being that of many persons severally interested in a common fund, is one of which equity takes jurisdiction; and the several suits merged by interpleader into one have become a suit in equity.

While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case the negotiations have been with representatives of the owners. The chiefs and headmen have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate; and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf but allowing them to receive the consideration per capita. In the present case the
96 Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and headmen of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their Government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested, with the communal owners who were carried to the west, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed per capita. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund; but their rights were inextricably woven with the rights and equities of the Cherokees, who were citizens of the nation; and the nation properly made no distinction when parting with the Outlet, but demanded justice, from the Cherokee point of view, for all Cherokees who had been wronged by the nonfulfillment of the treaty of New Echota. As to these Eastern nonresident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners.

After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the moneys awarded should be paid directly to the equitable owners. A great change has come within a few years both as to the powers and the responsibilities of the Cherokee

Nation. Its statute went to the full extent of the civil law in making the Government liable to all persons being citizens of the nation: "The Cherokee Nation shall be liable to all persons whatever, citizens of the nation, having claims at law or equity against her, to the same extent as individual persons are liable to each other, and may be sued by any citizen having a cause of action." (Code 1874, p. 240, § 130.)

But its judiciary has ceased to exist, and, as has before been said, the nation itself as a government will cease to exist. "The constitution of the Cherokees was a wonderful adaptation to the circumstances and conditions of the time, and to a civilization that was yet to come. It was framed and adopted by a people, some of whom were still in the savage state and the better portion of whom had just entered upon that stage of civilization which is characterized by industrial pursuits, and it was framed during a period of extraordinary turmoil and civil discord, when the greater part of the Cherokee people had just been driven by military force from their mountains and valleys in Georgia, and been brought by enforced immigration into the country of the Western Cherokees; when a condition of anarchy and civil war reigned in the Territory—a condition which was to continue until the two branches of the nation should be united under the treaty of 1846 (27 C. Cls. R., 1); yet for more than half a century it has met the requirements of a race steadily advancing in prosperity and education and enlightenment so well that it has needed, so far as they are concerned, no material alteration or amendment, and deserves to be classed among
97 the few great works of intelligent statesmanship which outlive their own time and continue through succeeding generations to assure the rights and guide the destinies of men. And it is not the least of the successes of the constitution of the Cherokees that the judiciary of another nation are able, with entire confidence in the clearness and wisdom of its provisions, to administer it for the protection of Cherokee citizens and the maintenance of their personal and political rights." (Journeycake v. Cherokee Nation, 28 C. Cls. R., 281, 317.)

Since those words were written a hopeless development has taken place in the affairs of this people. It has been with them as it has been with other nations—as it has been with families and individuals—to rise in the times of their tribulation, but to sink under the enervating blessings of prosperity.

"On the 1st August, 1838, while the dispirited throng of Cherokee exiles paused in their march at a temporary halting place, the name of which does not appear on the map nor in the list of post-offices, and which is known only from what transpired there as 'Aquohee camp,' they were able to declare through the hand of their great statesman and leader, Ross, that—

"Whereas the Cherokee people have existed as a distinct national community in the possession and exercise of the appropriate and essential attributes of sovereignty for a period extending into antiquity beyond the dates and record and memory of man;

"And whereas these attributes, with the rights and franchises which they involve, have never been relinquished by the Cherokee people, but are now in full force and virtue;

"And whereas the natural, political, and moral relations subsisting

among the citizens of the Cherokee Nation toward each other and toward the body politic can not, in reason and justice, be dissolved by the expulsion of the nation from its own territory by the power of the United States Government:

"Resolved, therefore, by the national committee and council and people of the Cherokee Nation in general council assembled, That the inherent sovereignty of the Cherokee Nation, together with the constitution, laws, and usages of the same, are, and by the authority aforesaid are hereby declared to be in full force and virtue, and shall continue so to be in perpetuity, subject to such modifications as the general welfare may render expedient." (Western Cherokees v. United States, 27 C. Cls. R., 1, 29.)

This declaration was an heroic resolve amid the most adverse circumstances to preserve forever the autonomy of the Cherokee people. It was not made in vain for the generation which so resolved. But the case of affluence and the inevitable demoralization of wealth have accomplished where the military power of the United States and the corrupt methods of their agents failed, and within the passing of less than three generations the perpetuity of the constitution and laws and usages of the Cherokee people will have come to an end.

In this condition of affairs the court must regard the Cherokee Nation as in a condition somewhat analogous to that of a trustee or receiver who has become insolvent; that is to say, as a person which should not be intrusted with the receipt and distribution of the moneys belonging to other persons.

98 The persons to whom distribution of this fund of $1,111,284.70 with accrued interest would be made if they were now living would be the communal owners of the Cherokee lands east of the Mississippi. By the tripartite treaty of 1846 the Western and the Eastern Cherokees were placed on the same footing with regard to all lands east of the Mississippi and with regard to the funds derived from them. It follows, necessarily, that each and all of the present communal owners, whether on the east or the west of the Mississippi, and whether the descendents of Eastern or Western Cherokees, have the same individual interest in the fund and will be entitled to like amount per capita.

A decree will be entered in this case following the form of that which was entered in the case of Whitmire, trustee, v. Cherokee Nation (30 C. Cls. R., 180). It will provide:

That the Cherokee Nation recover upon the agreement with the United States concluded on the 19th December, 1891, and ratified by the United States 3d March, 1893 (27 Stat. L., p. 640, §10), the amounts found due in the account rendered thereunder by the United States, to wit:

The value of three tracts of land containing 1,700 acres, at $1.25 per acre	$2,125.00
Amount paid for removal of Eastern Cherokees to the Indian Territory	1,111,284.70
Amount received by receiver of public moneys at Independence, Kans.	432.28
Interest on $15,000 of Choctaw funds, applied in 1863 to relief of indigent Cherokees	20,406.25

That the amount of $2,125, with interest thereon from February 27, 1819, to date of payment, nevertheless be retained by the Secretary of

the Interior and credited by the United States to the principal of the Cherokee school fund in their possession and of which they are trustees;

That the amount of 20,406.25, together with interest thereon from July 1, 1893, to date of the restoration of the fund, be likewise retained by the Secretary of the Interior and credited to the Cherokee national fund in the possession of the United States and of which they are trustees;

That the amount of $1,111,284.70, together with interest thereon from June 12, 1838, to a day when the Secretary of the Interior shall be ready to make payments, as hereinafter provided, nevertheless be paid directly to communal owners being Cherokees by blood, whether on the eastern or western side of the Mississippi River. And to that end the Secretary of the Interior is authorized to appoint one or more commissioners to proceed to the Cherokee country and to the country of the Cherokees residing east of the Mississippi to ascertain and report to the Secretary the facts necessary for the formation of rolls of all Cherokees by blood, the expenses of making out and preparing such rolls to be a charge upon and paid out of the fund awarded by the decree.

The decree will also provide for the payment of the fund to the parties per capita, the charge of distribution likewise to be a charge upon the fund.

The decree will also provide for the payment to the treasurer of the Cherokee Nation $432.28, together with interest thereon from January 1, 1874, to date of payment, as likewise set forth in said account.

The decree will also provide for the compensation of counsel and expenses and disbursements incident to the litigation.

99 WELDON, J., concurring:

Without going into the merits of this controversy on the different treaties made between the parties to this proceeding, and the laws of the United States enacted from time to time affecting the liability and relation of the parties, I come to consider the legal effect of the finding made by the agents and officers of the United States under the agreement of December 19, 1891, described in the act of March 3 (27 Stat. L., p. 640, sec. 10).

Commencing with the year 1835, in which year the treaty of New Echota was made with the Eastern Band of Cherokee Indians, disputes and differences existed between the United States and the Indians which culminated in the year 1891, when a treaty was made involving the sale and purchase of a district of country amounting in the aggregate to over 8,000,000 acres of land, known as the Cherokee Outlet. Aside from the intrinsic value of the lands there was a most material consideration moving to the United States in the necessity of having that tract of land; and, to the end that the United States might be the owner of that splendid domain of territory, they agreed to pay the Indians the sum of $8,300,000; and, as a further consideration and inducement to the Indians to enter into such an agreement, it was stipulated on the part of the United States as follows, to wit:

"The United States shall, without delay, render to the Cherokee Nation, through an agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the

the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835–36, 1846, 1866, and 1868 and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect; and upon such accounting should the Cherokee Nation, by its national council, conclude and determine that such an accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right to appeal to the Supreme Court of the United States, by either party, for any declared or alleged amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting. And the Congress of the United States shall at its next session after such case shall be finally decided and certified to Congress, according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of the national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting."

The subject-matter of the consideration upon the part of the Indians was composed of two elements; in the first they were to receive the sum of $8,300,000, a part of the consideration of the conveyance, and as the second element of consideration they were to receive "a complete account of the moneys due the Cherokee Nation" under all the treaties and laws which from 1817 to 1868 had been made or enacted affecting the pecuniary relations of the parties. The account was to be accepted or
100 rejected by the Indians as they might determine. It was known to them that an alleged settlement had been made in the year 1852, the legal effect of which had always been disputed by the Indians; and the agreement to render an account "of moneys due" "to an unlettered party" at least would be accepted as an opportunity to be relieved from the legal effect and binding force of the alleged settlement, by and through which they had been held at arm's length through more than a generation of their people.

Then follows another provision well calculated to operate on the minds of the Cherokee Nation as a special and material inducement to the making of the treaty or agreement of 1891. "And upon such accounting should the Cherokee Nation by its national council conclude and determine that such an accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims," with the right of appeal to the Supreme Court of the United States by either party for any declared or alleged amount of moneys.

The consideration therefore consists of different elements of inducements, and in law those elements constitute and form the basis upon which the agreement rests, and none can be eliminated without the destruction of the entire force of the agreement.

The consideration though in parts and sections is a unit, and to disturb or eliminate one element is to destroy the whole. The considera-

tion is the basis of the contract, and without its preservation as a whole the contract falls.

The court must therefore assume that without all of the considerations the Cherokee Nation would not have released to the United States a district of country large enough and rich enough to be one of the States of the Union.

Much discussion has been indulged in upon the question as to whether the finding which was submitted to the Cherokee Nation is an award, and if not an award, an account stated. It is not necessary to indulge in black letter learning upon the legal effect or character of the "account of moneys due the Cherokee Nation." It was a statement of the account founded upon the legal theory of the Cherokee Nation, and for which the Indians had struggled through the years from 1835 to 1891. It to them was a slow and tardy relief from the alleged iniquities and frauds of 1835, which, as they always thought, was the inception of their woes.

Upon the question as to whether the account rendered is in law an award or account stated, or whether it is either, is wholly immaterial to the proper settlement of the issue of this proceeding, and it is profitless to sagely balance the common-law question as to what constitutes either. It is sufficient for the purpose of this litigation to say that it is a material and lawful part of the consideration of a contract made by and between competent parties upon the subject-matter of which they had plenary jurisdiction.

In this connection it is apt to quote what the Supreme Court has said in the case of Worcester v. State of Georgia (6 Peters, 552):

"The language used in treaties should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than the plain import as connected with the tenor of the treaty, they should be construed as used in the latter sense.

* * * * * * *

"How the words of the treaty were understood by this unlettered people rather than in their critical meaning should form the rule of
101 construction. The question may be asked, Is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe with whom we have made treaties?

"The inquiry is not what station shall be given to the Indian tribes in this country, but what relation have they sustained to us since the commencement of our Government? We have made treaties with them, and are those treaties to be disregarded on our part because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them have we not admitted the power of this people to bind themselves and impose obligations on us?"

So, in 5 Wallace, 737:

"Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them. Hence a provision in an Indian treaty which exempts their lands from 'levy, sale, and forfeiture' is not, in the absence of an expression so to limit it, to be confined to a levy and sale under ordinary judicial proceedings only, but it is to be extended to levy and sale by county officers for nonpayment of taxes."

Congress having failed to pay the amount found due under the treaty of 1891 by the report of Messrs. Slade and Bender, passed an act of 1902, by virtue of which this court has jurisdiction.

The matter of complying with the treaty of 1891 was left by the appropriation act (to defray the expense of furnishing a statement to the Indians) to the Commissioner of Indian Affairs under the direction of the Secretary of the Interior as shown by the communication.

The Secretary in his communication to the Speaker of the House also transmits "a certified copy of the Cherokee national council accepting such accounting."

Up to that point the executive officers of the Government were proceeding step by step in the fulfillment of the promise made in the treaty of 1891, upon the faith of which the United States had acquired and were then in the enjoyment of the "Outlet."

The United States had bought the land of the Indians not for the sum of $8,300,000, but for that sum and other undertakings vital as an inducement to the Indians in making the agreement of 1891.

Courts can not apportion the consideration of a contract and say this is material and that is immaterial; parties have the right to measure the value of what they contract for, and are entitled to have that recognized by the courts.

The Congress in ratification of the plan of settlement, as provided in the treaty of 1891, passed an act appropriating the sum of $5,000 for the purpose of ascertaining the amount due the Cherokee Nation, and in pursuance of that act the Secretary of the Interior appointed James A. Slade and Joseph T. Bender to state the account then existing between the United States on one hand and the Cherokee Nation on the other, and in pursuance of such appointment and upon the fundamental authority of the agreement with the Indians made an examination and upon the result of that examination made a report of the indebtedness of the United States founded upon the theory that the removal of the Indians under the various treaties was to be at the cost of the United States.

102 It is not pretended that any mistake was made by the accountants upon the legal theory which they adopted as the basis of the liability of the defendants.

Upon the receipt of that report the Secretary of the Interior transmitted to Congress, through the Speaker of the House, the report of the expert accountants in the following communication:

"DEPARTMENT OF THE INTERIOR,
"*Washington, January 7th, 1895.*

"SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article two of the agreement made December 19th, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3rd, 1893 (27 Stats., 643), a certified copy of a complete account of money due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1828, 1835–6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect, prepared in accordance with the provisions of said act of March 3rd, 1893, together

with a certified copy of the Cherokee national council accepting such accounting.

"Very respectfully,

"HOKE SMITH, *Secretary.*

"The SPEAKER OF THE HOUSE OF REPRESENTATIVES."

The account when rendered to the Cherokee Nation proved acceptable to it and upon the faith of its acquiescence in the report, as shown by the letter of the Secretary of the Interior, the council of the nation passed a formal acceptance of it.

If the United States were dissatisfied with the report of Slade and Bender, the dissatisfaction should have been manifested as soon as it was known to the authorities of the United States who had in charge the matter and not after the Cherokee council had formally accepted the report as a correct statement of the account between the parties, and a formal delivery to the Cherokee Nation of a part of the consideration on which the bargain and sale of the land were made.

The appointment of the expert accountants, the acceptance from them of the result of the examination, and the transmittal of the report to the Cherokee Nation was the official act of the Secretary of the Interior, the officer who above all others has jurisdiction of the Indians of the United States. It is that Department of the Government which deals with the finances and all other interests belonging to the Indians of the United States. The Secretary of the Interior and the instrumentality of his Department is the medium through which the United States deals with "the wards of the nation."

The report which was to be furnished to the Indians for their acceptance or rejection has incident to it another important qualification; and that is if the Indians were dissatisfied with the statement of moneys due then they had the right to bring a suit against the United States within twelve months to settle by judicial determination the respective right of the parties. Relying on the good faith of the Government, the council of the Cherokee Indians accepted the statement of Slade and Bender and thereby waived the right to bring a suit against the United States; and, that right being waived, founded on the action of the United States, are
they not now estopped from denying the legal effect of their own
103 act? The Indians were misled by the act of the United States when they assumed that the account after acceptance would be dealt with in pursuance of the other requirements of the treaty. Consider the rights of the litigants in the light of the law which has been announced for nearly a century by the Supreme Court of the United States, the fundamental theory of which is that language must never be construed to their prejudice. (Worcester v. State of Georgia, supra.)

The position of the defendants in refusing to abide by the result of the treaty of 1893, consummated as it was by the act of the Cherokee council, the executive officers, and the lawfully authorized agents of the United States, is not keeping faith with the wards of the nation in the spirit of that "justice and reason" recognized by the courts when dealing with the obligation of the United States as the guardian of the Indian.

In the case of the Choctaw v. The United States (119 U. S. R., p. 1) it is said in the syllabi:

"The relation between the United States and the Indian tribes, being those of a superior toward an inferior who is under its care and control, its acts touching them and its promises to them, in the execution of its own policy and in the furtherance of its own interests, are to be interpreted as justice and reason demand in cases where power is exerted by the strong over those to whom they owe care and protection. (United States v. Kagama, 118 U. S., 375, cited and applied.)"

I concur in the result reached by the court as exemplified in the opinion of the Chief Justice.

PEELLE, J., concurring.

I concur in the conclusion of the court that there should be a recovery against the United States for the several amounts found due by the experts, Slade and Bender, but in my view of the case that conclusion should be sustained upon the theory, or assumption, as the experts say, "that the United States was to pay the expense of removal" of the Eastern Cherokees from their eastern home to the Indian Territory.

If the United States are so liable, then the defendants concede that the account as stated by Slade and Bender is correct.

The first and main question to be determined, therefore, is as to the liability of the United States, and it is conceded that if such liability exists it arose under the treaties of 1835–36 and 1846 (7 Stats. L., 478, and 9 Stats. L., 871).

To interpret correctly the treaty of 1835–36 within the spirit of the decisions of the Supreme Court, it is essential to know how the Cherokee people understood the terms of the treaty and whether they had probable grounds for such understanding.

Practically from the beginning of the Government—to make room for white settlers—it was the policy of the United States to encourage the removal of the Indians domiciled in the Eastern States to the territory west of the Mississippi River. This policy is now manifest from the various treaties entered into by the United States with the several tribes—now a part of the history of the country—by which the Indians ceded their lands situate in the Eastern States to the Government and migrated to territory provided for them west of the Mississippi River.

104 By the treaty of 1817 with the Cherokee Indians (7 Stat. L., 156), in furtherance of promises previously made by the President that those Indians who desired to continue the life of hunting instead of settling down to agriculture and civilized life, should have homes in the West on the waters of the Arkansas and White rivers (to which some of the Indians had migrated), it was provided in article 6, in addition to the compensation therein provided for the improvements left by them, that to aid in their removal the United States agreed "to furnish flat-bottomed boats and provisions sufficient for that purpose. * * * The boats and provisions promised to the emigrants are to be furnished by the agent on the Tennessee River, at such time and place as the emigrants may notify him of; and it shall be his duty to furnish the same."

By the treaty of 1828 with the Western Cherokees (7 Stats. L., 311) who had migrated to Arkansas Territory under the promise of the President and the treaties of 1817 and 1819, whereby the lands of the Western

Cherokees in that Territory were exchanged for lands in the Indian Territory, the United States by article 8, to encourage the Cherokees residing East to join their brothers in the West, agreed in addition to giving them certain specified articles, to pay the cost of their emigration and to furnish them with provisions for their support on the way and provisions for twelve months after their arrival at the agency, and in addition thereto to give each person who took along with him four persons as emigrants and permanent settlers the sum of $150.

Thus, in addition to paying the expenses of removal and subsistence as there stated, the United States agreed, by way of encouraging them to induce others to migrate, to pay a bonus to each individual taking four such persons with him.

The treaty of 1833 (7 Stats. L., 414), as provided by article 5 thereof, was supplementary to the treaty of 1828 and was "not to vary the rights of the parties to said treaty any further than said treaty is inconsistent with the provisions of this treaty, now concluded, or these articles of convention and agreement."

It was not only the policy of the United States, as before stated, to encourage the removal of the Indians westward, but it was their policy to pay the expenses of their removal and their subsistence, as shown by the treaties with the Choctaws in 1820 (7 Stats. L., 210); with the Creeks in 1826 (7 Stats. L., 286); with the Chickasaws in 1832 (7 Stats. L., 381); with the Seminole in 1832 (7 Stats. L., 368), and with the Delawares and the Delawares and Shawnees in 1829 and 1832 (7 Stats. L., 327 and 397). Can it be doubted that what was thus done was well known to the Cherokee Indians at the time of the treaty of 1835? Indeed, when a draft of the latter treaty was first submitted to them in general council at Red Clay, October 23, 1835, there was read and interpreted to them a letter from President Jackson in which, among other things, he said "for the removal, at the expense for the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of $150 to each person." (H. R. Docs., vol. 7, No. 286, p. 41, 24th Cong., 1st sess.)

And so the eighth article of the treaty of 1835 provided:

"The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggage
105 wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

"Such Cherokees also as reside at present out of the nation and shall remove with them in two years west of the Mississippi shall be entitled to allowance for removal and subsistence as above provided."

Up to this point, therefore, I take it there can be no well-grounded

controversy either as to what the Government had done respecting the cost of removal and subsistence of the various tribes of Indians theretofore removed to the Indian Territory, or as to what the purpose of the Government was by article 8 of the treaty of 1835 respecting the like expense of removing the Cherokees to the same Territory.

The language of the article will not bear the construction that the Government was advancing money to defray such expense or that the allowances therein provided to those capable of removing themselves was intended as a charge against the treaty fund.

But for article 15 of the treaty it must be conceded that the Government had obligated itself to defray the cost of removal and subsistence, and this was not only in conformity with what the Government had theretofore done respecting the removal of other Indian tribes, but was in conformity with the promise of the President made to the Indians in general council when a draft of the treaty was first submitted to them at Red Clay some two months before, in substantially the same form in which it was finally signed at New Echota, in the State of Georgia.

Now, keeping in mind what has been said respecting the understanding of the Cherokee people as to who was to pay the cost of their removal and subsistence, turn to article 15, which provides:

"ARTICLE 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts, and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national funds provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed; and such Cherokees as have removed west since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east, they shall also be paid for their improvements, according to their approved value, before their removal, where fraud has not already been shown in their valuation."

Between the provisions of that article and those of article 8, respecting the cost of removal, there is a conflict, and if the ordinary rules of construction applicable to contracts between individuals are enforced,
then it must be conceded that the cost of removal was properly
106 charged to the treaty fund. However, after this treaty had been
signed, but before its ratification, a controversy arose as to whether the provisions of the treaty obligated the United States to pay the cost of removal, the Cherokee people insisting that the United States were so bound; and hence supplementary articles were entered into, which, so far as material to this case, are as follows:

"ARTICLE 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars, fixed by the Senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi River, was not intended to include the amount which may be required to remove them, nor the value of certain

claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question, and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above-mentioned sum of five millions of dollars should include the objects herein specified, that in that case such further provision should be made therefor as might appear to the Senate to be just.

"ARTICLE 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people, to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preemptions and of the sum of three hundred thousand dollars for spoliations described in the first article of the above-mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

"But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the Senate, and if they shall approve the same then this supplement shall remain part of the treaty."

The Senate agreed to the supplementary articles, and the treaty as thus supplemented was ratified and subsequently promulgated. Thus the supposition of the Cherokee people that the United States were to bear the cost of removal was conceded by the Senate (which had fixed the value of their lands and possessions at $5,000,000) to be well founded, for upon the basis of the cost of removal, as stated in article 8, the sum agreed upon was thought to be sufficient, and if it had been, the controversy in that regard would have ended there. The allowance of $600,000 was not in the nature of a gratuity, but was in furtherance of a right which the Senate conceded.

The grounds for allowing the sum of $600,000, as recited in the second supplementary article, were that the Cherokee people supposed that the sum of $5,000,000 so fixed by the Senate as the value of their lands and possessions "was not intended to include the amount which may be required to remove them," and in the third supplementary article it was "therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal" and certain other claims there stated.
107 And it was therein expressly understood that if said article should be approved by the Senate, "then this supplement shall remain part of the treaty."

Inasmuch, therefore, as the basis of that allowance was the belief of the Cherokee people that the $5,000,000 fixed by the Senate as the value of their lands and possessions "was not intended to include the amount which may be required to remove them, etc.," I am of the opinion that the supplementary articles necessarily operated to modify article 15 by eliminating therefrom the word "removal," thereby harmonizing that article with article 8. Certain it is that when the Senate ratified the

supplementary articles allowing the sum of $600,000, which had been estimated as the amount necessary for the purpose stated, the practical effect was to eliminate from article 15 the word "removal," and such, I believe, was the intention of the parties from the language which they employed.

In the case of Cherokee Nation v. Georgia (5 Pet., 1, 15) the court, by Chief Justice Marshall, some four years before the treaty of 1835, in speaking of the controversy between the Cherokee Nation and the State of Georgia, said:

"If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant the present application is made."

And further along in the same opinion, in referring to the tribes which reside within the acknowledged boundaries of the United States, it is said:

"They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

"They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their great father."

In the later case of Worcester v. Georgia (6 Pet., 515, 582) Mr. Justice Washington, in a concurring opinion, said:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."

And such has been the holding of our courts in dealing with the Indian tribes ever since. And especially should this rule prevail where
108 the Indians sign a treaty by mark, as they did the treaty of 1835, and when the terms of the treaty were made known to them only by the oral translation of an interpreter.

Notwithstanding the Indians were required by the provisions of article 16 of that treaty to remove within two years, only a small minority migrated prior to 1837–38. But the expense of the removal and subsistence of that minority, together with the other expenditures chargeable thereto, nearly exhausted the $600,000 allowed by the third supplementary article, so that it became necessary to make a further appropriation to defray the expenses of removal and subsistence of those thereafter migrating. The expense of such removal and subsistence was estimated by the Secretary of War, and thereafter the Congress, by the act of June

12, 1838, appropriated the sum so estimated as "in full of all objects in third article of supplementary articles of treaty of 1835 with the Cherokees;" and in the same paragraph it was recited that "No part of said money shall be deducted from the five million dollars stipulated to be paid to said tribe by said treaty." If not to be so deducted, then it certainly follows that the United States were to pay the cost of such removal and subsistence; not a part of it, but the whole of it.

Notwithstanding the provision thus made, the Indians were still opposed to removal, but when confronted with the military forces under General Scott they finally yielded, and an arrangement was entered into whereby they were nearly all removed to the Indian Territory by the fall of 1838. The cost of this removal and subsistence largely exceeded $1,000,000, and of the sum paid by the United States $1,111,284.70 was charged to the treaty fund; hence the cause of complaint.

Soon after their removal trouble arose between them and the Western Cherokees, as well as those Cherokees who had been signatory parties to the treaty of 1835 and had migrated thither prior to 1838. The Eastern Cherokees were by far the most numerous, and though they repudiated the treaty of 1835 and charged that those who had entered into it had done so through corrupt motives, still they sought governmental control of the nation, which was resisted by the Western Cherokees, claiming that as the Eastern Cherokees had come into their territory without their consent and without payment for any portion of the lands they should be subject to the rule of the Western Cherokees. But the Eastern Cherokees refused to be controlled by the minority. The result was that trouble arose, and serious consequences were anticipated if something was not speedily done to allay the ill feeling.

In 1838, in national convention assembled, the people comprising the eastern and western Cherokee nations were, by mutual agreement, united into one body politic under the style and title of the Cherokee Nation, and in that name it was agreed that all rights and titles to Cherokee public lands east or west of the Mississippi River, together with all of their interests which may have vested in either branch of the Cherokee family, whether inherited or derived from any other source, should vest unimpaired in the Cherokee Nation.

Soon thereafter the reunited Cherokees adopted a constitution, declaring that the two branches had become reunited and that "the lands of the Cherokee Nation should remain common property."

Such declared union, however, did not have the effect of allaying the difficulties between the two factions. Extreme measures were
109 being resorted to by both factions to accomplish their ill-conceived purposes, and at the same time the Eastern Cherokees were claiming that the expense of their removal and subsistence should be borne by the United States.

These differences, bordering on bloodshed as between the two factions, and the increasing hostility of the Eastern Cherokees toward the United States for charging them with the cost of removal and subsistence, led to the treaty of 1846 (9 Stats. L., 871). The preamble to that treaty recites that the purpose of the treaty was to effect a final and amicable settlement of the claims in controversy between themselves and between them and the United States; and to that end it was in substance

agreed that the lands occupied by the Cherokee Nation should be secured to the whole people and that the United States should issue to them a patent for said lands; a general amnesty was declared in respect to all difficulties and disputes; that the Cherokees should be reimbursed for all claims made against them by the United States and deducted from the $5,000,000 treaty fund; that the Western Cherokees should be reimbursed for the lands ceded by them by the treaty of 1828, out of the residuum of the sums arising out of the treaty of 1835. That is to say, from the $5,600,000 granted by the treaty of 1835 there should be deducted the investments and expenditures stipulated in article 15 of said treaty, and out of the residuum there should be paid to the Western Cherokees a sum equal to one-third, to be distributed to them per capita, and that in arriving at that residuum there should be charged for removal only $20 per capita and for subsistence $33.33 per capita, as provided by article 8 of the treaty of 1835. By article 9 the United States agreed to make a "fair and just settlement of all moneys due the Cherokees and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor." By article 11, in respect to the cost of removal and subsistence of the Eastern Cherokees under the treaty of 1835, it was agreed that the questions should be submitted to the Senate, by whose decision they agreed to abide.

In respect to the cost of subsistence the Senate decided that the United States should bear the expense, and there was accordingly restored to the treaty fund the sum of $189,422.76, but the provision requiring the United States to pay the cost of removal was rejected by the Senate. The treaty as thus modified and ratified was acquiesced in by the Indians. But the delay of the Government in causing a fair and just settlement to be made of all moneys due the Indians under the treaty of 1835, which by the treaty of 1846 the Government had agreed to make, caused dissatisfaction among the Indians, and they petitioned Congress to carry out the provisions of the treaty.

The account was finally stated by the Commissioner of Indian Affairs and on the basis of that report the Congress passed a joint resolution (9 Stat. L., 339) authorizing the accounting officers of the Treasury to make a just and fair settlement of the claims of the Cherokee, according to the principles of the treaty of 1846, and to make their report thereof at the next session of Congress, which was done, but no action was taken by Congress thereon. Later, however, by the act of February 27, 1851
(9 Stat. L., 573), Congress appropriated the sum of $724,603.37,
110 with interest thereon at the rate of 5 per cent per annum from June 12, 1838, until April 1, 1851. In the paragraph making the appropriation there was added this proviso:

"Provided, however, That the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore made with the Cherokees. And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever

on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation; and, except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees: And provided further, That the money appropriated in this item shall be paid in strict conformity with the treaty with said Indians of sixth August, eighteen hundred and forty-six."

In 1852, in conformity with the provision authorizing settlement to be made, the sum so appropriated, together with the further sum of $189,422.76 theretofore allowed for subsistence, making in all $912,026.13, was—though the Cherokee Nation entered its protest to the settlement on the basis proposed—paid to the Cherokees, for which a receipt was executed in full as provided in the act. Thus the long and persistent controversy between the Cherokee Nation and the United States was, notwithstanding said protest, supposed to be adjusted and settled as provided by the act.

If the matter had rested there the controversy between them would have been at an end, notwithstanding the protest of the Cherokee Nation. But on December 19, 1891, an agreement was entered into between the Government and the Cherokee Nation, by article 1 of which the Cherokee Nation agreed to cede to the United States 8,144,682.91 acres known as the Cherokee Outlet; and by article 2 it was agreed on behalf of the United States that for and in consideration of said cession the United States would (1) remove from the limits of the Cherokee Nation certain trespassers; (2) a certain article of the treaty of 1866 should be held for naught; (3) the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction in certain cases; (4) "The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying such treaties, or any of them, into effect; and upon such accounting should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States, in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amounts of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws which may be claimed to be omitted from, or unfairly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall, at its next session, after such case shall be finally
111 decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor, or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council; said appropriation to be made by Congress, if then in session, and if not, then at the next session immediately following such accounting;" (5) that certain citizens of the

Cherokee Nation should have the right to select lands as homesteads under certain conditions, and (6) that the United States should pay for said lands the sum of $8,300,000.

The other provisions of the treaty are not material to this case, but in transmitting the treaty the commissioners on the part of the United States reported to the President by way of explanation—doubtless to induce the ratification of the agreement—that in the relinquishment of the title to the land it was made a condition precedent that the United States should render to the Cherokee Nation a complete account of moneys due to the nation under treaties as stated in the fourth subdivision of article 2 above quoted, and this, they say, "because the Cherokees are compelled to accept the construction of the treaties made by the Executive and administrative branches of the Government," and that "Whatever that construction is, the Indians must abide by it," there being "no appeal except to Congress." The commissioners also reported that the Indians "claimed that upon a just accounting, upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found due them;" and that as the Government had kept the books and construed the treaties, no harm could come from restating the account, for if not theretofore correctly stated, "no possible reason can exist why the error should not be corrected." (Senate Ex. Doc. 56, 52d Cong., 1st sess., pp. 11 and 12.)

The agreement so entered into was approved by the Cherokee national council January 4, 1892, and ratified by the Congress by the act of March 3, 1893 (27 Stats. L., 640). By the same act the sum of $5,000 was appropriated "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement," set out above.

Therefore, as part consideration and inducement for the sale of the land, the United States agreed that they would without delay render "a complete account of moneys due the Cherokee Nation; and, in furtherance of the agreement and the appropriation therefor, such experts were appointed and an account was rendered, which was accepted by the Cherokee Nation, and its rights to sue in this court was thereby waived.

The Cherokees insisted upon the payment of the amount found due, but a question arose as to whether the experts had not exceeded their authority in so construing the treaties as to render the United States liable for the cost of the removal and then stating the account accordingly. It was contended then, and is now, that no question of law was submitted to them for decision; that they were merely to state the account as it existed, and this, it seems to me, is the correct view. The experts, however, in the account respecting the cost of removal, say:

"The cost of removal and subsistence prove to be very much
112 larger than was expected and provided for by the appropriation. The excess cost of subsistence over the amount appropriated has been refunded to the Cherokee Nation; but upon the assumption that the United States was (were) to pay the expense of removal there is due the Cherokee fund the sum of $1,111,284.70."

That amount, it will be noted, is stated as due upon the assumption of

the liability of the United States to pay the cost of removal. That liability the Congress desired determined, and for that purpose, in the act of July 1, 1902 (32 Stat. L., 717), making provision for the allotment of land to the Cherokee Nation and for other purposes, section 68 was incorporated in these words:

"SEC. 68. Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three and twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

Under that act the Cherokee Nation filed the petition herein claiming the several amounts stated in the account so rendered under the direction of the Secretary of the Interior as an award, and asked interest thereon at 5 per cent per annum from June 12, 1838. But doubts were entertained as to whether under that act the Eastern Cherokee could be made parties to the action, and so by the act of March 3, 1903 (32 Stat. L., 996), making appropriation for the Indian Department, section 68 was amended as follws:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensa-
113 tion for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Repre-

sentatives Executive Document Numbered Three hundred and nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants to whom the judgment so rendered equitably belongs, either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be."

Under the amended section the Eastern Cherokees appeared by counsel and filed their petition, claiming that they were entitled to the amount stated in the account so rendered under the direction of the Secretary of the Interior for the cost of their removal to the Indian Territory, with interest thereon at 5 per centum from June 12, 1838. Still another class, known as Eastern and Emigrant Cherokees, appeared by counsel and filed their petition, in which they claimed one-fourth of the amount stated as the cost of removal of the Eastern Cherokees to the Indian Territory. Therefore, the Cherokee Nation, as well as the Eastern and all other Cherokees claiming any interest in the subject-matter of the litigation, appear to be in court as required by the jurisdictional act.

The claim thus referred to as "mentioned in H. R. Executive Document No. 309 of the second session of the Fifty-seventh Congress," is, as stated in the resolution of the House of Representatives, December 16, 1902, as follows: "The award rendered under the Cherokee agreement of December 19, 1891, ratified by act of Congress approved March 3, 1893," and more particularly set forth in H. R. Executive Document No. 182, Fifty-third Congress, third session, pages 1, 32, and the findings of fact of the Court of Claims of April 28, 1892, which latter are substantially the findings of fact in the present case.

The foregoing findings of fact were made and reported to Congress in response to the resolution of the United States Senate referring to the court Senate bill No. 3681, providing for the payment of the award of the Secretary of the Interior in favor of the Cherokees under the provisions of the act of Congress of March 3, 1893. But in the latter part of the ninth finding, referring to the report of the experts Slade and Bender as to the amount charged to the treaty fund, the court said: "But whether said sum of one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70) was or was not improperly charged to the treaty fund, and whether interest should be allowed thereon, are questions of law upon which the court expresses no opinion."

Notwithstanding the report of the experts and the findings of the court were before the Congress, they did not see fit to make the appropriation to pay the amount found due, but instead referred the claim to the court for adjudication.

114 What, then, was referred to the court for adjudication? It is conceded in the court's opinion that the amount found due has none of the elements of an award nor of an account stated, but that as the rendition

of the account was made a part of the consideration for the sale of the Cherokee Outlet it is binding on the United States, and therefore the court can not go behind the account so rendered. That Congress did not take that view of the account is evident from their passage of the two acts conferring upon the court jurisdiction "to examine, consider, and adjudicate * * * any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States." The agreement of 1891, ratified by the Congress, respecting the rendition of an account, is that "The United States shall, without delay, render to the Cherokee Nation * * * a complete account of moneys due the Cherokee Nation under any of the treaties" therein referred to, and if the Cherokee council should "determine that such accounting is incorrect or unjust," the Cherokee Nation should then have the right, within twelve months, to enter suit in the Court of Claims against the United States. This it did not do, but instead accepted the account and thereby waived its right to sue. But were the United States bound to accept the account, based as it was upon the assumption of their liability under the several treaties? I think not, for the reason that the questions of law involved were not submitted to the experts for their decision by the appropriation authorizing their appointment, nor will the language of the agreement made the basis thereof bear such construction. The accounting contemplated by the agreement and for which the experts were appointed was a statement of the account as it actually existed between the United States and the Cherokee Nation; that is to say, to properly state the several claims of the Cherokee Nation and the payments made thereon by the United States. This they did not do, but upon the assumption of the liability of the United States to pay the cost of removal, stated a different account, and the result was the balance of $1,111,284.70 in favor of the Cherokee Nation, so that in my view of the case that question was left open by the experts for the court to deal with; but inasmuch as the Cherokee Nation accepted the account, though rendered upon the assumption of the liability of the United States, instead of bringing suit in the Court of Claims to have that question determined, it was left for the Congress to deal with, and hence the reference of the claim to this court. The jurisdiction of the court to determine that question is not controverted.

In my view of the case, as before stated, the supplementary articles to the treaty of 1835 operated to modify article 15 thereof by eliminating therefrom the word "removal," and with that word eliminated the United States were liable under the treaty of 1835 for the expense of removing the Eastern Cherokees to the Indian Territory; and such was evidently the view of Congress by the act of June 12, 1838, making appropriation to pay the sum estimated by the Secretary of War as necessary to defray the expenses of removal and subsistence hereinbefore referred to, in which, in the same paragraph, it is recited that "No part of said money shall be deducted from the five million dollars stipulated to be paid to said tribe by said treaty" (1835). That language seems to justify the views I have expressed and may well be considered in its effect as
115 a legislative construction of the treaty of 1835. In addition thereto Congress made appropriations to pay the entire cost of subsisting the Cherokees for one year after their removal to the Indian

Territory, notwithstanding the cost thereof, as stated in article 15 of the treaty of 1835, was to be deducted from the treaty fund the same as the cost of removal.

I therefore reach the conclusion that the assumption of the experts, that the United States were liable for the cost of removal, was well founded, and that the account rendered by them upon that theory is correct, as conceded by the defendants.

The next question is, To whom should the money be paid? It is conceded that the Cherokee Nation is entitled to recover under the treaty of 1819 and the treaty of 1866, and also certain interest under the act of Congress of March 3, 1893, the several sums set forth in the report of the experts, the disposition of each of which is correctly dealt with in the opinion of the court.

In respect to the sum of $1,111,284.70 for the expense of moving the Eastern Cherokees to the Indian Territory, that sum, if it had not been charged to the treaty fund, would, under the provisions of article 15 of the treaty of 1835, have been "equally divided among all the people belonging to the Cherokee Nation east, according to the census just completed," while the ninth article of the treaty of 1846, after providing for deductions for money properly expended under the treaty of 1835, provides that:

"The balance thus found to be due shall be paid over, per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto."

Hence whatever sums were properly chargeable under the treaty of 1835 were also chargeable under the ninth article of the treaty of 1846, and the balance remaining was to be equally divided as above stated; while in respect to those Cherokees remaining east it was expressly provided by article 10 of the treaty of 1846—though they were not parties thereto—that nothing in said treaty "shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi River had, or may have, under the treaty of 1835 and the supplement thereto."

But by article 4 of the treaty of 1846 it is provided, in respect of the Western Cherokees, that in consideration of the cession by them of their interest in the lands east and west of the Mississippi River, including the 8,088,889 acres ceded by the treaty of 1835—all of which was to remain the common property of the whole Cherokee people—after all the investments and expenditures properly chargeable to the $5,606,632 granted by the treaty of 1835 had been deducted, that a sum equal to one-third part of said residuum should be distributed per capita to each individual of the Western Cherokees, and that in estimating the expense of removal and subsistence of the Eastern Cherokees the sum stipulated as commutation therefor in article 8 of the treaty of 1835 be adopted.

Inasmuch, therefore, as the cost of removal, $1,111,284.70, was charged to the treaty fund in the settlement thus made, the Cherokees, both east and west, received less than they would have received but for such deduction. Hence, when that sum is restored to the treaty fund

the whole Cherokee people will be entitled to share in the sum so
116 restored the same as they would have been at the time of the treaty of 1846, plus whatever interest may now be added thereto.

The sum thus restored becomes a trust fund in the hands of the United States, not for the purpose of investment nor to be held by them, but for the sole purpose of distributing the same to the Cherokee people as provided by the treaties of 1835 and 1846.

By Revised Statutes, section 1091, this court is inhibited from allowing interest on any claim "unless upon a contract expressly stipulating for the payment of interest." There is no provision in either of the treaties of 1835 or 1846 respecting the payment of interest, except on the specific sums to be invested as provided by the treaty of 1835, and the court must therefore look elsewhere for authority, if interest is to be allowed.

No interest can be allowed on the sum under Revised Statutes, section 2096, as the same was not received under a treaty containing a stipulation for the payment of annual interest, but on the contrary was to be expended in defraying the cost of removal, etc. Nor can interest be allowed under Revised Statutes, section 2108, as the money is not going to incompetent or orphan Indians. Nor can interest be allowed under Revised Statutes, section 3659, as no interest has accrued thereon allowable by this court, nor has the sum been invested in stocks of the United States or other interest-bearing securities.

As the act of February 27, 1851, supra, under which the settlement of 1852 was made, authorized the payment of interest from June 12, 1838, to April 1, 1851, on the sum appropriated, it may fairly be assumed that if the sum of $1,111,284.70 now in controversy had then been settled, interest would have been paid thereon as provided by the act. But that act has performed its office and the court can not look thereto for the payment of interest, even for the period stated, so that I have grave doubts as to whether there is any provision of law authorizing the court to allow interest on said sum, however much I may think it ought to be allowed; but for the purposes of this case I will assume the allowance of interest and the correctness of the distribution, as set forth in the court's opinion.

WRIGHT, J., dissenting:

I do not concur in the opinion nor the conclusion of the majority of the court concerning the expense of the removal of the Indians. It is not strictly accurate to say that the $1,111,284.70 of the Slade and Bender account is part consideration for the sale of the Outlet, for that item had no existence until Slade and Bender made an account that was never in the records.

The stipulation relative to the existing dispute about the subject of removals was part of the agreement for such sale, and to that extent may be treated as entering into the inducement or consideration for such sale, but the rights of the parties created by the contract could not be enlarged nor abridged, without the consent of both, by the agents of either, while assuming to carry out the provisions of the agreement.

All that was contemplated by the fourth subdivision of article 2 of the agreement of December 19, 1891, was a statement of the account of

moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866, and 1868, and any laws passed by the Congress for the purpose of carrying said treaties, or any of them, into effect. Upon such accounting being
117 made the Cherokee Nation was given the right within twelve months to enter suit in this court not for any moneys appearing to be due upon the accounting, but for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation under any of the treaties or laws which might be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; or, if it should be found upon said accounting that any sum of money had been so withheld, the amount should be duly appropriated by Congress.

What manifestly was intended by the agreement was that the United States was to state, first, the moneys due to the Cherokee Nation under the treaties specified and the laws passed to carry them into effect, and, second, the disposition in fact made of such moneys—not what ought to have been done, but what was done. In other words, the account should state the various sums so appropriated, so that it would appear in a precise and compact form how much money was due the Cherokee Nation under the treaties and laws mentioned and the disbursements thereof in fact made by the United States.

This was the view taken by the Interior Department, before Congress ratified the treaty, in the report of the Commissioner of Indian Affairs, communicated to Congress, and upon which was made the appropriation of March, 1893, of $5,000 to employ such expert persons to properly render a complete account to the Cherokee Nation of moneys due, as required in the fourth subdivision of article 2 of the agreement. The report upon which the Congress acted in making such appropriation in effect stated that it seemed the intention of the parties to the agreement that what was required was a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under treaties and acts of Congress, and that being true it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century, and to prepare a statement of that kind it would require an appropriation of at least $5,000 to pay for the services of an expert accountant and assistants, and in the draft of the bill for the ratification of the agreement for the purchase of the Outlet the appropriation was provided for as recommended, thus proving by the act of ratification itself that Congress intended to require in such accounting only "a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress." Nothing was intimated or stated that the accountants were authorized to do more than to review and copy the accounts and records running back nearly a century. No authority was given to change the accounts, but to copy them.

The defendants agreed to inform the Cherokee Nation how much money was due to them under the various treaties and laws, and how much, for what purpose, and in what manner it had been paid out, thus forming a basis for the nation to come into this court and bring suit not merely for

a sum or balance appearing to be due on the face of such account, but to dispute the account, allege and declare an amount of money promised and withheld, or, in other words, that the United States had diverted or misappropriated an alleged amount, and upon such allegation this court was given jurisdiction to decide and give its judgment.

Slade and Bender, the accountants, mistook their authority;
118 however, and usurped the jurisdiction conferred upon this court and decided the questions intended for this court. They did not merely state the facts of the account as they existed, but changed the facts and undertook to state the account as they thought it ought to have been made. Their account was not the account of the defendants but the account they believed the defendants should have made instead. They substituted a different account for the one they were authorized to state.

It has been argued that the Secretary of the Interior by transmitting the Slade and Bender account to the Cherokee Nation thereby ratified and gave it effect. This can not be, for the plain reason that he was not the agent of the United States for such a purpose. The only authority conferred upon that officer was to employ such expert person or persons to properly render a complete account as required in the fourth subdivision of article 2 of the agreement.

It ought to require no argument to prove that beyond a mere statement of the existence of the account as in fact kept by the Government, a true exhibit thereof, the accounting of Slade and Bender is of no effect whatever. By their attempt to enter upon the jurisdiction so manifestly intended for this court they misled the Cherokee Nation, and thwarted the intention of the parties to obtain an early adjudication of the matters now before the court. As soon as this report was called to the attention of Congress it was repudiated, and the matter was again referred to this court in the form now existing, and the case is wholly unaffected by the report of Slade and Bender except in so far as it exhibits the true state of the account, the record of the facts and acts of the Government as they actually occurred at the respective times of the various transactions.

By setting aside the accounting of Slade and Bender as respects the charge for removals, we would be brought to a consideration of the case upon its merits, namely, the liability of the defendants for removals under the stipulations of the treaty of 1835. No subsequent act of Congress changed the treaty in this respect. The appropriations made for such purpose were, in view of the provisions of the treaty, mere gratuities, and did not bind the defendants to assume further liabilities. Congress might do so if they saw fit, but no legal obligation was assumed in that regard. Plaintiffs are now here claiming under the treaty of 1835, and it is familiar doctrine that they can not at the same time both claim under and repudiate its provisions. That the treaty of 1835, unchanged as it is, charged the expense of the removals to the plaintiffs is too plain for argument, as will appear by reading it within its four corners.

If the conclusion reached by the majority of the court is to be accepted as the final award of the moneys claimed in this suit, it will prove the futility of accomplishing any settlement of disputed matters by the mutual agreement of the parties.

Under the provisions of the act of 1851, in the year 1852 $912,026.13 was paid to and accepted by the Cherokee Nation with the express condition that the same should be in full satisfaction and in final settlement of all claims and demands whatsoever under any treaty theretofore made, with certain exceptions in which the present claim is not included. This settlement was fairly entered into and acquittance executed by the plaintiffs in conformity to the provisions of the act mentioned. No reason appears against the validity and binding force of the compromise, and there is none.

119

THE CHEROKEE NATION v. THE UNITED STATES.	No. 23199.	Consolidated.
THE EASTERN CHEROKEES v. THE UNITED STATES.	No. 23214.	
THE EASTERN AND EMIGRANT Cherokees v. THE UNITED STATES.	No. 23212.	

XIII.—Findings of fact and conclusions of law, filed May 18, 1905.

FINDINGS OF FACT.

The above consolidated causes having come on to be heard upon the pleadings and proofs, and having been argued by counsel, were submitted to the court for its decision, and the court being now here sufficiently advised in the premises finds the facts as established by the evidence in said consolidated causes to be as follows:

I.

Section 68 of the act of Congress of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation and for the disposition of town sites therein described, and for other purposes" (32 Stat., 726), is as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the
120 case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the

employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

The act of March 3, 1903, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes" (32 Stats., 996), contains the following provisions:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives Executive Document Numbered Three hundred and nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation or of the Eastern Cherokees, so called, as the case may be."

The claim mentioned in said H. R. Ex. Doc. No. 309, 57th Cong., 2d sess., is therein referred to and described as follows:

"Resolved, That the Attorney-General of the United States is hereby requested to advise the House of Representatives, with all convenient speed, in the case of the Eastern Cherokees against the United States, whether or not the award rendered under the Cherokee agreement of December 19, 1891, ratified by act of Congress approved March 3, 1893, as set forth in H. R. Ex. Doc. No. 181, 53d Cong., 3d sess., and
121 the findings of fact of the Court of Claims of April 28, 1902, is
res adjudicata; to review the opinion of the Department of Justice of December 2, 1895, and advise the House of Representatives whether the reasons set forth in that opinion now constitute a valid defense for the payment of said award."

II.

Prior to the year A. D. 1808 the Cherokee Nation of Indians was domiciled in Georgia, Alabama, Tennessee, North Carolina, and South Carolina, where they owned and possessed about 14,000,000 of acres of land. In that year deputations from the upper and lower Cherokee towns, duly authorized by their nation, went to the city of Washington, the deputies of the former to make known to the President of the United States the anxious desire of those whom they represented to engage in the pursuits of agriculture and civilized life in the country which they then occupied, and to request the establishment of a division line between the upper and lower towns, so that they might the more readily begin the establishment of fixed laws and a regular government; the deputies of the latter to make known to the President their desire to continue the hunter life, and, owing to the scarcity of game where they then lived, their wish to remove across the Mississippi River on some vacant lands of the United States.

After maturely considering the petitions of both parties, on January 9, 1809, the President answered the same, saying that—

"The United States, my children, are the friends of both parties, and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighborhood. Those who wish to remove are permitted to send an exploring party to reconnoiter the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of those rivers. * * *

"When this party shall have found a tract of country suiting the emigrants and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right."

Relying on the promises of the President of the United States, as above recited, the Cherokees who wished to remove explored the country on the west side of the Mississippi and made choice of and settled themselves down upon United States lands on the Arkansas and White rivers, to which no other tribe of Indians had any just claim, and subsequently sent their agents, duly empowered to execute a treaty relinquishing to the United States all their right, title, and interest to all lands which they had left, or which they were about to leave, and belonging to them as a part of the Cherokee Nation, in all of which lands, proportioned to their numbers, they had an equal right.

To the treaty of cession, which was subsequently entered into on the 8th day of July, 1817, the chiefs, headmen, and warriors of the Cherokee Nation east of the Mississippi, as well as the chiefs, headmen, warriors, and deputies of the Cherokees on the Arkansas River, were parties.

122 By article 1 of said treaty "the chiefs, headmen, and warriors of the whole Cherokee Nation" ceded to the United States certain lands described therein, "in part of the proportion of land in the Cherokee Nation east of the Mississippi River, to which those now on the Arkansas and those about to remove there are justly entitled."

By article 2 said chiefs, headmen, and warriors also ceded to the United States other lands therein described.

"ART. 4. The contracting parties do also stipulate that the annuity due from the United States to the whole Cherokee Nation for the year one thousand eight hundred and eighteen is to be divided between the two parts of the nation in proportion to their numbers, agreeably to the stipulations contained in the third article of this treaty, and to be continued to be divided thereafter in proportion to their numbers; and the lands to be apportioned and surrendered to the United States agreeably to the aforesaid enumeration, as the proportionate part, agreeably to their numbers, to which those who have removed and who declare their intention to remove have a just right, including these with the lands ceded in the first and second articles of this treaty.

"ART. 5. The United States bind themselves, in exchange for the lands ceded in the first and second articles hereof, to give to that part of the Cherokee Nation on the Arkansas as much land on said river and White River as they have or may hereafter receive from the Cherokee Nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas, agreeably to their numbers; which is to commence on the north side of the Arkansas River at the mouth of Point Remove, or Budwell's old place; thence by a straight line northwardly to strike Chataunga Mountain, or the hill first above Shield's ferry, on White River, running up and between said rivers for complement, the banks of which rivers to be the lines; and to have the above line from the point of beginning to the point on White River run and marked, which shall be done soon after the ratification of this treaty; and all citizens of the United States, except Mrs. P. Lovely, who is to remain where she lived during life, removed from within the bounds as above named. And it is further stipulated that the treaties heretofore between the Cherokee Nation and the United States are to continue in full force with both parts of the nation and both parts thereof entitled to all the immunities and privilege which the old nation enjoyed under the aforesaid treaties, the United States reserving the right of establishing factories, a military post, and roads within the boundaries above defined.

"ART. 6. The United States do also bind themselves to give to all the poor warriors who may remove to the western side of the Mississippi River one rifle gun and ammunition, one blanket, and one brass kettle, or in lieu of the brass kettle a beaver trap, which is to be considered as a full compensation for the improvements which they may leave, which articles are to be delivered at such point as the President of the United States may direct; and to aid in the removal of the emigrants they further agree to furnish flat-bottomed boats and provisions sufficient for that purpose; and to those emigrants whose improvements add real value to their lands the United States agree to pay a full valuation for the same, which is to be ascertained by a commissioner appointed by the President of the United States for that purpose, and paid for as soon after the
123 ratification of this treaty as practicable. The boats and provisions promised to the emigrants are to be furnished by the agent on the Tennessee River, at such time and place as the emigrants may notify him of, and it shall be his duty to furnish the same.

* * * * * * *

"ART. 11. It is further agreed that the boundary lines of the lands ceded to the United States by the first and second articles of this treaty, and the boundary line of the lands ceded by the United States in the fifth article of this treaty, is to be run and marked by a commissioner or commissioners appointed by the President of the United States, who shall be accompanied by such commissioners as the Cherokees may appoint, due notice thereof to be given to the nation." (Treaty of July 8, 1817, between the United States and Cherokee Nation; 7 Stat. L., 156. Indian Affairs. Laws and Treaties (1903), vol. 2, p. 96.

III.

February 27, 1819, a treaty was entered into between the United States and the "chiefs and headmen of the Cherokee Nation of Indians, duly authorized and empowered by said nation," the preamble of which is as follows:

"Whereas a greater part of the Cherokee Nation have expressed an earnest desire to remain on this side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, signed the eighth of July, eighteen hundred and seventeen, might, without further delay or the trouble or expense of taking the census, as stipulated in the said treaty, be finally adjusted, have offered to cede to the United States a tract of country at least as extensive as that which they probably are entitled to under its provisions, the contracting parties have agreed to and concluded the following articles."

By Article I the Cherokee Nation cedes to the United States the lands therein described, and the parties mutually declare "that the lands hereby ceded by the Cherokee Nation are in full satisfaction of all claims which the United States have on them, on account of the cession to a part of their nation who have or may hereafter emigrate to the Arkansas; and this treaty is a final adjustment of that of the eighth of July, eighteen hundred and seventeen."

By Article VI of said treaty it was estimated that the Cherokees who had emigrated and those who had enrolled for emigration together constituted one-third part in numbers of the whole nation. (7 Stats., 195. Indian Affairs. Laws and Treaties, vol. 2, pp. 124, 126.)

IV.

On May 6, 1828, the United States entered into a treaty with the "Cherokee Nation of Indians west of the Mississippi," the preamble of which is as follows:

"Whereas, it being the anxious desire of the Government of the United States to secure to the Cherokee Nation of Indians, as well those now living within the limits of the Territory of Arkansas as
124 those of their friends and brothers who reside in States east of the Mississippi and who may wish to join their brothers of the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around

it the lines or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and

"Whereas the present location of the Cherokees in Arkansas being unfavourable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by treaty, and resting also upon the pledges given them by the President of the United States and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the west, and, as may be seen on referring to the records of the War Department, still being anxious to secure a permanent home and to free themselves and their posterity from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexions in future; and

"Whereas it being important, not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas, whenever it may become a State, of either or both of those tribes, the parties hereto do hereby conclude the following articles, viz."

Article 1 defines the western boundary line of Arkansas.

"ART. 2. The United States agree to possess the Cherokees and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land," all west of the western boundary of Arkansas and bounded as therein set forth, and "In addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States and their right of soil extend."

"ART. 3. The United States agree to have the lines of the above cession run without delay," and "to remove immediately after the running of the eastern line from the Arkansas River to the southwest corner of Missouri, all white persons from the west to the east of said line * * * and also to keep all such from the west of said line in future."

By article 5 it was agreed "that the United States, in consideration of the inconvenience and trouble attending the removal, and on account of the reduced value of a great portion of the land herein ceded to the Cherokees, as compared with that of those in Arkansas which were made theirs by the treaty of 1817 and the convention of 1819, will pay to the Cherokees, immediately after their removal, which shall be within fourteen months of the date of this agreement, the sum of fifty thousand dollars; also an annuity for three years of two thousand dollars, towards defraying the cost and trouble which may attend upon going after and recovering their stock, which may stray into the Ter-
125 ritory in quest of the pastures from which they may be driven; also eight thousand seven hundred and sixty dollars for spoliations committed on them (the Cherokees), which sum will be in full of

all demands of the kind up to this date," * * * and "to pay two thousand dollars annually to the Cherokees for ten years, to be expended under the direction of the President of the United States in the education of their children in their own country, * * * also one thousand towards the purchase of a printing press and type." * * *

"ART. 7. The chiefs and headmen of the Cherokee Nation aforesaid, for and in consideration of the foregoing stipulations and provisions, do hereby agree, in the name and behalf of their nation, to give up, and they do hereby surrender, to the United States, and agree to leave the same within fourteen months, as hereinbefore stipulated, all the lands to which they are entitled in Arkansas and which were secured to them by the treaty of 8th January (July), 1817, and the convention of the 27 February, 1819.

"ART. 8. The Cherokee Nation, west of the Missis'ppi, having by this agreement freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and to their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States east of the Mississippi, who may desire to remove west, shall be given, on enrolling himself for emigration, a good rifle, a blanket and kettle, and five pounds of tobacco; (and to each member of his family one blanket), also a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation, and support by the way, and provisions for twelve months after their arrival at the agency; and to each person, or head of a family, if he take along with him four persons, shall be paid immediately on his arriving at the agency and reporting himself and his family or followers as emigrants and permanent settlers, in addition to the above, provided he and they shall have emigrated from within the chartered limits of the State of Georgia, the sum of fifty dollars, and this sum in proportion to any greater or les number that may accompany him from within the aforesaid chartered limits of the State of Georgia.

Pursuant to the terms of this treaty, the Cherokee Nation, west of the Mississippi, peaceably removed from their lands on the Arkansas and White rivers, in the Territory of Arkansas, to the lands newly ceded to them in the Indian Territory. The moneys agreed to be paid to them under the fifth article have been fully paid, and no claim is now made on such account. (7 Stats., 311; Ind. Affairs, Laws, and Treaties, vol. 2, pp. 206–208; H. R. Ex. Doc. 182, 53d Cong., 3d sess., 4; Red Book, p. 65.)

126 V.

By treaty of February 14, 1833, between the United States and the "chiefs and headmen of the Cherokee Nation of Indians west of the

Mississippi," a change in the boundary lines of the lands ceded under the treaty of 1828 was agreed upon to adjust a conflict with the grant previously made to the Creek Indians, and by article 1 of said treaty of 1833 the United States, in addition to renewing its guarantee and pledge of 7,000,000 acres of land to the Cherokees, further agreed that—

"In addition to the seven million of acres of land thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend, * * * and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed."

By article 5 of said treaty it was provided that—

"These articles of agreement and convention are to be considered supplementary to the treaty before mentioned between the United States and the Cherokee Nation west of the Mississippi, dated sixth of May, one thousand eight hundred and twenty-eight, and not to vary the rights of the parties to said treaty any further than said treaty is inconsistent with the provisions of this treaty now concluded, or these articles of convention or agreement." (7 Stats., 414; Ind. Affairs, Laws, and Treaties (1903), pp. 283, 285.)

VI.

On or about February 28, 1835, a delegation of the Cherokee Nation east of the Mississippi, having full power and authority to conclude a treaty with the United States, stipulated and agreed with the Government of the United States to submit to the Senate the matter of the amount which should be allowed to their nation for their claims and for a cession of their lands east of the Mississippi River, agreeing for themselves to abide by the award of the Senate of the United States, and to recommend the same to their people for their final determination.

The Senate, on March 6, 1835, by resolution, advised that "a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi River."

The Cherokee delegation, after the award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty, but they declined to do so, insisting that the Senate had been misled to the injury of the Cherokees, and that the matter of said award "should be referred to their nation and there, in general council, to deliberate and determine on the subject in order to insure harmony and good feeling among themselves." (7 Stats., 478; Ind. Affairs (1903), p. 324; Sen. Ex. Doc. 215, 56th Cong., 1st sess., p. 77.)

On or about March 14, 1835, a certain other delegation of Cherokees,
who represented that portion of the nation east, who were in favor
127 of emigrating to the Cherokee country west of the Mississippi, but
had no authority or power from the nation generally, entered into propositions for a treaty with John F. Schermerhorn, commissioner on the part of the United States, which they agreed to submit to the nation for final action and determination.

Among other things included in the draft of the proposed treaty, it

was proposed that the sum of $5,000,000 should be paid to the members of the Cherokee Nation east for their lands and possessions in accordance with the above-quoted resolution or "award" of the Senate, but it was further proposed that there should be deducted from said five millions the sum of $255,000 to defray the expenses of removing the members of the nation to the west. (Sen. Ex. Doc. 215, 56th Cong., 1st sess., pp. 81–82.)

The proposed treaty was unanimously rejected by the Cherokee national council for the reason that the expense of removal was thereby proposed to be deducted from the fund of $5,000,000. (Sen. Ex. Doc. 215, 56th Cong., 1st sess., p. 83; Sen. Ex. Doc. 120, 25th Cong., 2d sess., 459.)

During the consideration of this proposed treaty by the Cherokee council members thereof a letter from President Jackson, bearing date March 16, 1835, was read to them, purporting to explain the proposed treaty. That letter is as follows:

"I shall in the course of a short time appoint commissioners for the purpose of meeting the whole body of your people in council. They will explain to you more fully my views and the nature of the stipulations which are offered to you.

"These stipulations provide—

"1st. For an addition to the country already assigned to you west of the Mississippi, and for the conveyance of the whole of it by patent in fee simple, and also for the security of the necessary political rights, and for preventing white persons from trespassing upon you.

"2d. For the payment of the whole value to each individual of his possessions in Georgia, Alabama, North Carolina, and Tennessee.

"3d. For the removal, at the expense of the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of one hundred and fifty dollars to each person.

"4th. For the usual supply of rifles, blankets, and kettles.

"5th. For the investment of the sum of four hundred thousand dollars, in order to secure a permanent annuity.

"6th. For adequate provisions for schools, agricultural instruments, domestic animals, missionary establishments, the support of orphans, etc.

"7th. For the payment of claims.

"8th. For granting pensions to such of your people as have been disabled in the service of the United States.

"These are the general provisions contained in the arrangement. But there are many other details favorable to you which I do not stop here to enumerate, as they will be placed before you in the arrangement itself. Their total amount is four million five hundred thousand dollars, which, added to the sum of five hundred thousand dollars, estimated as the value of the additional land granted you, makes five millions of dollars—a sum, if equally divided among all your people east of the Mississippi, estimating them at ten thousand, which I believe is their full number, would
128 give five hundred dollars to every man, woman, and child in your nation. There are few separate communities whose property if divided would give to the persons composing them such an amount." (Senate Doc. 215, 56th Cong., 1st sess., 82.)

VII.

December 29, 1835, a treaty was drawn up between the United States and the "Chiefs, headmen, and people of the Cherokee tribe of Indians," which treaty is commonly called the "Treaty of New Echota."

Neither the "Western Cherokees," or "Old Settlers," nor the great body of the "Eastern Cherokees" were parties to this treaty, and they at all times up to the making of the treaty of 1846 repudiated it on the ground that its execution had not been authorized by them or their representatives in council.

The small number of Cherokees east of the Mississippi who negotiated the treaty were called or styled the "Treaty Party."

It was provided, among other things, by this treaty, as follows:

"ARTICLE 1. The Cherokee Nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi River, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles. But as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised 'that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi River' have included and made any allowance or consideration for claims for spoliations, it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision, and if no allowance was made for spoliations, that then an additional sum of three hundred thousand dollars be allowed for the same."

ART. 2. That as it was apprehended that the lands west of the Mississippi which the United States by treaty of May 6, 1828, and supplemental treaty of February 14, 1833, guaranteed and secured to be conveyed by patent "to the Cherokee Nation of Indians" did not contain a sufficient quantity of land for the accommodation of the whole nation on their removal west, the United States, in consideration of $500,000, agreed to convey to said Indians by patent in fee simple a further tract of land, estimated to contain 800,000 acres.

ART. 3. The lands ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty should be included in one patent executed to the Cherokee Nation of Indians by the President of the United States.

"ART. 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as, in the opinion of the
129 emigrating agent, are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of

their family and, in lieu of their one year's rations, they shall be paid the sum of thirty-three dollars and thirty-three cents, if they prefer it.

"Such Cherokees also as reside at present out of the nation shall remove with them in two years west of the Mississippi and shall be entitled to an allowance for removal and subsistence as above provided.

"ART. 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, for spoliations, removal subsistence, and debts and claims upon the Cherokee Nation and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national fund provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed; and such Cherokees as have removed west since June, 1833, who are entitled by the terms of their enrolment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east, they shall also be paid for their improvements according to their approval value before their removal where fraud has not already been shown in their valuation."

By article 16 it was stipulated that the Cherokees should remove to their new homes within two years from the ratification of this treaty.

The leaders of the treaty party who had signed the treaty of 1835 contended that the sum of $5,000,000 was not intended to include the amount which might be required to remove them.

On March 1, 1836, the President submitted to the Senate the following supplementary articles, which were adopted as part of the treaty:

"ARTICLE 1. It is therefore agreed that all the preemption rights and reservations provided for in articles 12 and 13 shall be and are hereby relinquished and declared void.

"ART. 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi River was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question, and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above-mentioned sum of five millions of dollars should include the objects herein specified that in that case such further provision should be made therefor as might appear to the Senate to be just.

"ART. 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preemptions, and of the sum of three hundred thousand
130 dollars for spoliations described in the 1st article of the above-mentioned treaty. This sum of six hundred thousand dollars

shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

"But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the Senate, and if they shall approve the same then this supplement shall remain part of the treaty."

The treaty and the supplementary articles were ratified and adopted as one instrument and proclaimed May 23, 1836.

VIII.

The Cherokee Indians who removed west of the Mississippi prior to May 23, 1836, were called "Western Cherokees." After the removal, under the treaty of 1835–36, of the Cherokees who had remained in the Cherokee country east of the Mississippi to the lands west of the Mississippi, the term "Western Cherokees" was no longer distinctive, and the Cherokees who had theretofore been known as such were thereafter popularly known as "Old Settlers."

The Cherokees who were domiciled east of the Mississippi River at the time of the making of the treaty of 1835–36, according to the census just then completed, were thereafter known as "Eastern Cherokees," the great body of whom subsequently, in 1838, moved to the lands west of the Mississippi.

IX.

Subsequent to the treaty of 1828, and prior to the signing of the treaty of December 29, 1835, almost continuous efforts had been made to induce the Cherokee people east to remove to the Indian Territory, but without success. Under the provisions of said treaty of 1835, practically nothing was accomplished in such direction until the summer of 1838, when the Cherokee Nation east yielded to superior force, and, under the supervision and direction of their own leaders, emigrated west of the Mississippi to the lands theretofore ceded to the Cherokee Nation west. (Red Book, p. 65.)

X.

The sum of $5,580,000 provided for by the supplementary articles of the treaty of 1835–36 was estimated to be more than sufficient to pay the cost of removal and all claims of every nature and description against the Government of the United States not otherwise provided for in said treaty, and it was therefore provided that whatever surplus might remain after removal and payment of claims should be turned over and belong to the education fund. (7 Stat., 486.)

On July 2, 1836, Congress confirmed the action of the Senate, as evidenced by the supplementary articles of said treaty, and appropriated, according to the terms of the third supplementary article, heretofore quoted, $600,000 for the removal of the Cherokees and for spoliations.

This sum proved to be insufficient for the purposes for which it was appropriated.

131 The treaty of December 29, 1835, was refused recognition by the great body of the Cherokees. They protested against it through their constituted authorities on numerous occasions and refused to give it any recognition, declared it to be unauthorized by the Cherokee people and a fraud on the United States. (Sen. Ex. Doc. 392, 56th Cong., 1st sess., pp. 7–10.)

The Cherokees having made no preparations to remove, as required by the terms of the treaty of 1835, Gen. Winfield Scott, with an army of men in May, 1838, placed them in camps of concentration under military control, preparatory to their removal by force. Thereupon, John Ross sought to make a treaty with the United States, but his overtures were rejected and the removal of the Cherokees by force was insisted upon by the United States, except in the alternative that the Indians would agree to remove themselves peaceably.

In the latter part of May, 1838, the President transmitted to Congress a letter bearing date May 18, 1838, from the Secretary of War to John Ross, principal chief of the Cherokee Nation, wherein the following appears:

"If it be desired by the Cherokee Nation that their own agent should have charge of their emigration, their wishes will be complied with and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect; with regard to the expense of this operation which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made of Congress."

This last communication was transmitted to Congress, and on May 23, 1838, the House of Representatives, by resolution, required a statement of the further amount necessary to pay for the removal and subsistence of the Cherokees (ibid., 78). On May 25, 1838, the Secretary of War submitted an estimate to the Speaker of the House of Representatives "of the amount that would be required" to remove 15,840 Cherokees and to subsist 18,756 Cherokees, stating that the further sum necessary for this purpose was $1,047,087 (ibid., 78), and on June 12, 1838, Congress appropriated this amount, with the proviso that no part of it should be deducted from the $5,000,000 fund. (5 Stat. L., p. 242; Finding VI, Cong., 10386.)

XI.

The appropriation of June 12, 1838, for the removal of the Cherokees, was used in part to meet the expenses of removing certain fugitive Creeks then living among them. The Cherokee council, by resolution of July 21, 1838, authorized John Ross to undertake the self-emigration of the Cherokees, under what they claimed to be the "special understanding with the Hon. Secretary of War," that such emigration should be at the expense of the United States, and by resolution of July 26, 1838, authorized Ross and associates to arrange for "the payment of such sums of money by the United States as might be necessary for the removal" "of the Cherokee people."

The Cherokee council, about the same time and before the payment of any money, passed a resolution on August 1, 1838, declaring that they did not recognize the treaty of New Echota, and that they would
132 not in any manner give their sanction or approval of it. (Record, pp. 213, 215, 217.)

The amount appropriated by Congress June 12, 1838, for the "object specified in the third supplementary article of the treaty with the Cherokees in 1835" for removal expenses, etc., to wit, $1,047,067, remained untouched in the Treasury on January 1, 1839, as appears from the books of the United States Treasury. (Receipts and Expenditures 1839, p. 260.)

XII.

The cost of the removal of the Eastern Cherokees from Georgia to the Indian Territory, paid and expended by the United States, was $1,495,485.92, which amount was obtained as follows:

From the $600,000 appropriated July 2, 1836	$335,165.91
From the $1,047,067 appropriated June 12, 1838	49,065.31
From the $500,000,000 appropriated July 2, 1836	1,111,284.70
Total	1,495,485.92

(Sen. Ex. Doc. 215, 56th Cong., 1st sess., p. 95; Finding V, Cong. 10386.)

That portion of the cost of subsisting the Eastern Cherokees after their arrival in the Indian Territory, which was at first deducted by the United States from the $5,000,000 treaty fund, was subsequently refunded and paid to the Cherokees, as hereinafter shown. (Finding IV, Cong., 10386.)

Of said amount of $1,495,485.92 paid by the United States for the removal of the Eastern Cherokees from Georgia to the Indian Territory, as set forth above, $137,740 was paid for the removal of 2,200 of such Cherokees who had voluntarily emigrated (27 C. Cls. Reports, p. 3, Finding III) at a cost to the Government of $61.70 per capita (Senate Doc. No. 215, 56th Cong. 1st sess., p. 78), and $1,357,745.92 were paid to John and Lewis Ross for the removal of the main body of the remainder of such Cherokees in 1838 (Senate Doc., supra).

The amount of $1,111,284.70, charged against the $5,000,000 fund, as before set forth, still remains charged against that fund (Senate Doc. 215, 56th Cong., 1st sess., p. 95). (Finding V, Cong., 10386.)

XIII.

After the removal of the Eastern Cherokees to the lands west of the Mississippi certain leaders of both the Western and Eastern Cherokees met at Illinois Camp Grounds and there, on July 12, 1838, entered into an "Act of Union between the Eastern and Western Cherokees," which is as follows:

"Whereas our fathers have existed as a separate and distinct nation in the possession and exercise of the essential and appropriate attributes of sovereignty from a period extending into antiquity, beyond the records and memory of man; and whereas these attributes, with the rights and franchises which they involve, remain in full force and virtue, as do also the national and social relation of the Cherokee people to each other

and to the body politic, excepting in those particulars which have grown
out of the provisions of the treaties of 1817 and 1819 between the
133 United States and the Cherokee Nation, under which a portion of
our people removed to this country and became a separate community (but the force of circumstances have recently compelled the body of the Eastern Cherokees to remove to this country, thus bringing together again the two branches of the ancient Cherokee family), it has become essential to the general welfare that a union should be formed and a system of government matured adapted to their present condition, and providing equally for the protection of each individual in the enjoyment of all his rights:

"Therefore we, the people composing the Eastern and Western Cherokee Nation, in national convention assembled, by virtue of our original unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic under the style and title of the Cherokee Nation.

"In view of the union now formed, and for the purpose of making satisfactory adjustment of all unsettled business which may have arisen before the consummation of this union, we agree that such business shall be settled according to the provisions of the respective laws under which it originated, and the courts of the Cherokee Nation shall be governed in their decisions accordingly. Also, that the delegation authorized by the Eastern Cherokees to make arrangements with Major-General Scott for their removal to this country shall continue in charge of that business, with their present powers, until it shall be finally closed; and, also, that all rights and titles to public Cherokee lands on the east or west of the River Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers our derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation as constituted by this union.

"Given under our hands at Illinois camp grounds this twelfth day of July, 1838.

"By order of the national convention:

"GEORGE LOWRY,
"*President of the Eastern Cherokees.*

his
"GEORGE X GUESS,
mark
"*President of the Western Cherokees.*"

(117 U. S., 303–305.)

On the 6th of September following, the Cherokees who had agreed upon the union adopted a constitution of government which, after reciting that the Eastern and Western Cherokees had become reunited in one body politic under the style and title of the Cherokee Nation, proceeds as follows:

"The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens, respectively, who made or may rightfully be in possession of them: Provided, That the citizens of the nation, possessing exclusive and indefeasible rights to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements in

any manner whatever to the United States, individual States, or to individual citizens thereof; and that whenever any citizen shall remove
134 with his effects out of the limit of this nation and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: Provided, nevertheless, That the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation, on memorializing the national council for such readmission." (117 U. S., 305.)

At a meeting of the Cherokee people held at Tahlequah, in the Cherokee Nation, on January 16, 1840, the following declaration was made:

"Whereas a meeting of the Cherokee people was agreed on and requested by the United States agent and the assistant principal chief and others, on the 15th instant, at this place, and general notification given throughout the country to all parties whatever, requesting their prompt attendance for the purpose of ascertaining fairly and properly the sense and choice of a majority of the nation in relation to the subject of their future government; and whereas we, the people of the Cherokee Nation, having assembled under this call, and having heard, read, and interpreted the act of union adopted by the Eastern and Western Cherokees, dated July, 1839, and the constitution framed by a convention composed of members from both parties in pursuance of the provisions of the aforesaid act, and being satisfied with the same, we do hereby approve, ratify, and confirm the said act of union and the constitution, and acknowledge and make known that the government based upon this act and this constitution is the legitimate government of the Cherokee Nation and of our choice, and that it has both our confidence and support.

"Done at Tahlequah, Cherokee Nation, the 16th day January, 1840.

"J. VANN,
"*Assistant Principal Chief.*

"W. SHOREY COODEY,
"*President National Committee.*"

(27 Ct. Cls., 32.)

In January, 1840, General Arbuckle, the military commander at Fort Gibson, in charge of the Cherokee country in Indian Territory, reported to the Secretary of War with regard to the act of union and the constitution above referred to—

"The act of union referred to in one of the accompanying decrees is certainly not entitled to credit, as there were a very small number of the old settlers present who concurred in it, and they acted without authority."

He added:

"This change will no doubt be severely felt by the old settlers generally, who in their kindness invited the late emigrants to enjoy with them the lands they have secured for themselves, and who have in less than one year after their arrival formed a new government for the nation in which the old settlers are not represented by a single individual of their own choice."

And on the 29th January he wrote to the Commissioner of Indian Affairs:

"A meeting was called for both parties to attend, consisting of old settlers and new emigrants, Cherokees, the object being to ascertain
135 which party had the majority. The old settlers did not attend, as they were doubtless well aware that they were in the minority. There were about 700 voters present, who were in favor of the new government; they voted in favor of the constitution and laws of the Ross party." (27 Court of Claims, 33.)

Notwithstanding said act of union and subsequent proceedings there remained much bitter feeling between the Eastern Cherokees and the "Old Settlers," and violent measures were frequently resorted to on both sides to carry out their purposes. These circumstances, among others, led to the making of the treaty of August 6, 1846 (9 Stats. L., 871), wherein it is recited that—

"Serious difficulties have for a considerable time past existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation and portions of the Cherokee people against the United States;" therefore "with a view to the final and amicable settlement of the difficulties and claims before mentioned" and "to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be" (Western Cherokees v. United States, 27 Ct. Cls., 36, par. 3), it is agreed, among other things, as follows:

"ARTICLE 1. That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835 and in the third section of the act of Congress approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, always, That such lands shall revert to the United States if the Indians become extinct or abandon the same.

"ART. II. All difficulties and differences heretofore existing between the several parties of the Cherokee Nation are hereby settled and adjusted, and shall, as far as possible, be forgotten and forever buried in oblivion. All party distinctions shall cease, except so far as they may be necessary to carry out this convention or treaty. A general amnesty is hereby declared. All offences and crimes committed by a citizen or citizens of the Cherokee Nation against the nation or against an individual or individuals are hereby pardoned. All Cherokees who are now out of the nation are invited and earnestly requested to return to their homes, where they may live in peace, assured that they shall not be prosecuted for any offence heretofore committed against the Cherokee Nation

or any individual thereof. And this pardon and amnesty shall
136 shall extend to all who may now be out of the nation and who shall return thereto on or before the 1st day of December next. The several parties agree to unite in enforcing the laws against all future offenders. Laws shall be passed for equal protection and for the security of life, liberty, and property; and full authority shall be given by law to all or any portion of the Cherokee people peaceably to assemble and petition their own government or the Government of the United States for the redress of grievances and to discuss their rights. All armed police, light horse, and other military organizations shall be abolished, and the laws enforced by the civil authority alone.

"No one shall be punished for any crime or misdemeanor except on conviction by a jury of his country and the sentence of a court duly authorized by law to take cognizance of the offence. And it is further agreed all fugitives from justice, except those included in the general amnesty herein stipulated, seeking refuge in the territory of the United States, shall be delivered up by the authorities of the United States to the Cherokee Nation for trial and punishment.

"Article III. Whereas certain claims have been allowed by the several boards of commissioners heretofore appointed under the treaty of 1835 for rents, under the name of improvements and spoliations, and for property of which the Indians were dispossessed, provided for under the 16th article of the treaty of 1835; and whereas the said claims have been paid out of the $5,000,000 fund; and whereas said claims were not justly chargeable to that fund, but were to be paid by the United States, the said United States agree to reimburse the said fund the amount thus charged to said fund, and the same shall form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty; and whereas a further amount has been allowed for reservations under the provisions of the 13th article of the treaty of 1835 by said commissioners, and has been paid out of the said fund, and which said sums were properly chargeable to, and should have been paid by, the United States, the said United States further agree to reimburse the amounts thus paid for reservations to said fund; and whereas the expenses of making the treaty of New Echota were also paid out of said fund, when they should have been borne by the United States, the United States agree to reimburse the same and also to reimburse all other sums paid to any agent of the Government and improperly charged to said fund; and the same shall also form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty.

"Art. IV. And whereas it has been decided by the board of commissioners recently appointed by the President of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves, that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States in relation to the Indian tribes, and the Cherokee Nation in particular, that that portion of the Cherokee people known as the 'Old Settlers' or 'Western Cherokees' had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the

whole nation, including as well that portion then east as that portion then
west of the Mississippi; and whereas the said board of commis-
137 sioners further decided that, inasmuch as the territory before
mentioned became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, the Cherokees then west of the Mississippi, by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi River, as well as in those occupied by themselves west of that river, which interest should have been provided for in the treaty of 1835, but which was not, except in so far as they, as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi, and in the general funds of the nation; and therefore they have an equitable claim upon the United States for the value of that interest, whatever it may be.

"Now, in order to ascertain the value of that interest, it is agreed that the following principle shall be adopted, viz: All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to five millions six hundred thousand dollars (which investments and expenditures are particularly enumerated in the 15th article of the treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would, under such marshalling of accounts, be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to one-third part of said residuum, to be distributed per capita to each individual of said party of 'Old Settlers,' or 'Western Cherokees.' It is further agreed that, so far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of five million six hundred thousand dollars above mentioned, the sums for removal and subsistence stipulated in the 8th article of the treaty of 1835, as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted. And, as it affects the settlement with the Western Cherokees, there shall be no deduction from the fund before mentioned in consideration of any payments which may hereafter be made out of said fund; and it is hereby further understood and agreed that the principle above defined shall embrace all those Cherokees west of the Mississippi who emigrated prior to the treaty of 1835.

"In the consideration of the foregoing stipulation on the part of the United States, the 'Western Cherokees' or 'Old Settlers,' hereby release and quitclaim to the United States all right, title, or claim they may have to a common property in the Cherokee lands east of the Mississippi River, and to exclusive ownership to the lands ceded to them by the treaty of 1833 west of the Mississippi, including the outlet west, consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included."

Articles 9, 10, and 11 are as follows:

"ART. 9. The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty and shall
138 embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835, the aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over per capita in equal amounts to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto.

"ART. 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi River had, or may have, under the treaty of 1835 and the supplement thereto.

"ART. 11. Whereas the Cherokee delegations contend that the amount expended for the one year's subsistence, after their arrival in the West, of the Eastern Cherokees is not properly chargeable to the treaty fund, it is hereby agreed that that question shall be submitted to the Senate of the United States for its decision, which shall decide whether the subsistence shall be borne by the United States or the Cherokee funds, and if by the Cherokees, then to say whether the subsistence shall be charged at a greater rate than thirty-three 33/100 dollars per head; and also the question, whether the Cherokee Nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date and at what rate per annum."

XV.

The Senate of the United States, acting as umpire under Article II of the treaty of 1846, on September 5, 1850, passed the following resolution:

"Resolved by the Senate of the United States, That the Cherokee Nation of Indians are entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the Treasury.

"Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the t[illegible]th

day of June, eighteen hundred and thirty-eight, until paid." (Sen. Journal, 31st Cong., 1st sess., p. 602.)

This amount was accordingly appropriated by Congress for that purpose by the act of September 30, 1850, with the proviso that interest be paid on the same at the rate of 5 per cent per annum, according to a resolution of the Senate of the 5th of September, 1850 (9 Stat. L., p. 556). (Finding VII, Cong., 10386.)

139 XVI.

Under the fourth article of the treaty of 1846 the accounting officers of the United States made and prepared for settlement the account therein provided for, whereby it appears that upon crediting the treaty fund therein mentioned as the article prescribes, there would remain a balance of $1,571,346.55, one-third of which distributable to the Western Cherokees, amounting to $523,448.85. Congress, in point of fact, on such account appropriated $532,782.18, and this amount, with interest thereon at 5 per cent from June 12, 1838, was thereupon paid and distributed to the Western Cherokees per capita. The account is as follows:

The fund provided by the treaty of 1835 was taken to be			$5,600,000.00
From which was deducted under the treaty of 1846 (4th article) the sums chargeable under the 15th article of the treaty of 1835, which, according to the report of the accounting officers, stood thus:			
For improvements		$1,540,572.27	
For ferries		159,572.12	
For spoliations		264,894.09	
For removal and subsistence of 18,026 Indians, at $53.334 per head		961,386.66	
Debts and claims upon the Cherokee Nation, viz:			
National debts (10th article)	$18,062.06		
Claims of United States citizens (10th article)	61,073.49		
Cherokee committee (12th article)	22,212.76		
		101,348.31	
Amount allowed United States for additional quantity of land ceded		500,000.00	
Amount invested as a general fund of the nation		500,880.00	
			4,028,653.45
Which, being deducted from the treaty fund of $5,600,000, leaves the residuum contemplated by the 4th article of the treaty of 1846			1,571,346.55
One-third of which balance would be			523,448.85

The balance found by this accounting to be due the Western Cherokees was appropriated for and paid to the individual distributees by and under the provisions of the act of September 30, 1850 (9 Stats., 556).

Under the ninth article of the treaty of 1846 the accounting officers of the United States made and prepared for settlement the account provided for by that article, whereby it appears that after crediting the treaty fund with the cost of subsistence of the Indians at the West, with which it had been charged, there remained a balance due of $914,026.13. Congress accordingly, in addition to the amount of $189,422.76, which had been appropriated for by the act of September 30, 1850 (9 Stats., 556), pursuant to the resolution of the Senate, by the act of February 27, 1851, appropriated the further sum of $724,603.37, and there was thereupon paid and distributed to the Eastern Cherokees per capita the

above amounts, with interest thereon at 5 per cent from June 12, 1838.

140 This account in detail is as follows:

Appropriation, July 2, 1836			$5,000,000.00
Appropriation, July 2, 1836			600,000.00
Appropriation, June 12, 1838			1,047,362.50
Appropriation, February 27, 1851			90,000.00
Appropriation, September 30, 1850			189,151.28
Amounts advanced to individuals and afterwards retained out of appropriation of February 27, 1851			27[illegible]
			6,933,489.78
Disbursements:			
For improvements		$1,540,372.27	
For ferries		150,372.12	
For spoliations		264,894.09	
For removal and subsistence and commutation (herefor, including $2,705.84 expended for goods for the poorer Cherokees, under the fifteenth article of treaty of 1835, as follows:			
Removal, subsistence, and commutation	$2,823,192.93		
Physicians, matrons, medicines, hospitals, stores, etc	32,003.91		
Superintendents, clerks, interpreters, disbursing, issuing, and enrolling agents, conductors, and contingencies	96,989.42		
		2,952,186.26	
For debts and claims upon the Cherokee Nation:			
National debts (tenth article)	18,062.06		
Claims of United States citizens (tenth article)	61,075.49		
Cherokee committee (twelfth article)	22,212.76		
		101,348.31	
For the additional quantity of land ceded to the nation		500,000.00	
For amount invested as the general fund of the nation		500,880.00	
		6,019,463.05	6,019,463.05
			914,026.73

On the 27th of November, 1851, before the payment of any money on account of either of the above-mentioned balances of $523,448.50 and $914,026.13, or the signing of any receipts by the Indians on account thereof, the Cherokee national council made a formal statement of the national claims arising as was contended under the treaties of December 29, 1835, and August 16, 1846, and protested against the above-mentioned settlement accounts with respect to the failure of the accountants to credit therein the treaty fund with the expenses of removal, saying, among other things:

"1st. Because no allowance is made for the sums taken from the treaty fund for removal to the West, although that charge depended on precisely the same words in the treaty of 1835 as did the one year's subsistence, and the Senate unanimously decided on the question submitted to them as arbitrators that the item of subsistence was not a proper charge upon the Cherokee fund. That had been the decision of the Senate about the date of the treaty when that question was specially presented. It was

again so considered by Mr. Poinsett, Secretary of War, in 1838, and his decision was sanctioned by the action of Congress and an appropriation was made for that purpose. But the estimates being too small by half, the Indian fund was then for the first time seized upon.

141 "2d. If it be conceded that the Cherokee fund was liable for these charges, their amount was limited by the eighth article of the treaty to a certain specified amount, and the Government had no right to exceed that amount and charge it to the Indian fund.

"3d. We complain that the alternative of receiving for subsistence $33.33, as provided for in the treaty, was refused to be complied with and the people forced to receive rations in kind at double the cost.

"4th. We complain that the rations issued by the military commandant at Fort Gibson to 'indigent Cherokees' was improperly charged to treaty fund without any legal authority.

"5th. We claim that the United States is bound to reimburse the amount paid to more than 200 or 300 Cherokees who had emigrated to the West prior to 1835, but who were refused a participation in the 'old settler' fund and thrown on the emigrant party who removed after that date.

"6th. We claim that the Cherokees who remained in the States of Georgia, North Carolina, and Tennessee were not entitled to any share in the per capita fund, as they complied with neither of two conditions of their remaining East, both of which were indispensable, and, also, because the census of those Cherokees is, as we believe, enormously exaggerated.

"7th. We complain that the sum of $103,000 has been charged upon the treaty fund for expenses of Cherokees in Georgia three months after they were all assembled and had reported themselves to General Scott as ready to commence the march.

"8th. We claim interest on the balance found due us from the 15th of April, 1851, till paid, Congress having no power to abrogate the stipulations of a treaty.

"9th. We also complain that $20,000 of the fund of the emigrant Cherokees were taken to pay the counsel and agents of the 'Old Settlers' without any authority."

On the 22d day of September, 1851, the western Cherokees had also formulated a separate protest against the proposed settlement with them ("Old Settlers" case, 27 C. Cls., 9).

Both of the foregoing protests were transmitted to and received by the Commissioner of Indian Affairs during the month of April, 1852.

Thereafter said balance of $914,026.13, with interest at 5 per cent from June 12, 1838, was duly paid and distributed to and among the Eastern Cherokees per capita, and the individual Eastern Cherokees executed and delivered to the United States a full and final discharge of all claims and demands whatsoever on the United States, as required by the statute making the appropriations.

This discharge was in the form following:

"We, the undersigned emigrant or Eastern Cherokees, do hereby acknowledge to have received from John Drennan, Superintendent Indian Affairs, the sums opposite our names, respectively, being in full of all demands under the treaty of sixth of August, eighteen hundred and forty-six, according to the principles established in the ninth article thereof,

and appropriated by Congress per act 30th of September, 1850, and per act 27th of February, 1851, which reads as follows:

"And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by treaty to pay to said Cherokee Nation, and except also such money and lands, if any, as the United States may hold in trust for said Cherokees." (Findings VIII, Cong., 10386.)

142

And thereafter the said balance of $532,782.18, with interest at 5 per cent from June 12, 1838, was appropriated by Congress, was duly paid and distributed to and among the Western Cherokees per capita, and the individual Western Cherokees executed and delivered to the United States a discharge in the following form:

"We, the undersigned 'old settlers' or Western Cherokees, do hereby acknowledge to have received from John Drennan, Supt. of Indian Affairs, the sums set opposite our names, respectively, being in full of all demands under the provisions of the treaty of the sixth of August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, as per act entitled 'An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, one thousand eight hundred and fifty-one,' approved September 30th, 1850."

The provisions of the appropriation acts referred to in the finding are as follows, viz:

[Act of September 30, 1850 (9 Stats. L., 523, 556).]

"To the 'old settlers' or 'Western Cherokees," in full of all demands under the provisions of the treaty of sixth August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, five hundred and thirty-two thousand eight hundred and ninety-six dollars and ninety cents, and that interest be allowed and paid upon the above sums due respectively to the Cherokees and 'old settlers,' in pursuance of the above-mentioned award of the Senate, under the reference contained in the said eleventh article of the treaty of sixth August, eighteen hundred and forty-six: Provided, That in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due: Provided also, That the Indians who shall receive the said money shall first respectively sign a receipt or release, acknowledging the same to be in full of all demands under the fourth article of said treaty."

[Act of February 27, 1851 (9 Stat. L., 570, 572).]

"For payment to the Cherokee Nation the sum of seven hundred and twenty-four thousand six hundred and three dollars and thirty-seven cents, and interest on the above sum at the rate of five per centum per annum, from twelfth day of June, eighteen hundred and thirty-eight, until paid, shall be paid to them out of any money in the Treasury

not otherwise appropriated; but no interest shall be paid after the first
of April, eighteen hundred and fifty-one, if any portion of the
143 money is then left undrawn by the said Cherokees: Provided,
however, that the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore made with the Cherokees. And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation, and except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees: And provided further, that the money appropriated in this item shall be paid in strict conformity with the treaty with said Indians of sixth August, eighteen hundred and forty-six."

No portion of either of said balances was paid to the Cherokee Nation or its citizens, otherwise than as above set forth, and no receipt or discharge other than as above described passed to the United States on account of such payments.

XVII.

By act of Congress of February 29, 1889 (25 Stats., 694), it was provided—

"That the claim of that part of the Cherokee Indians known as the Old Settlers or Western Cherokees against the United States, which claim was set forth in the report of the Secretary of the Interior to Congress of February third, eighteen hundred and eighty-three (said report being made under act of Congress of August seventh, eighteen hundred and eighty-two), and contained in Executive Document Number Sixty of the the second session of the Forty-seventh Congress, be, and the same hereby is, referred to the Court of Claims for adjudication; and jurisdiction is hereby conferred on said court to try said cause and to determine what sum or sums of money, if any, are justly due from the United States to said Indians, arising from or growing out of treaty stipulations and acts of Congress relating thereto, after deducting all payments heretofore actually made to said Indians by the United States, either in money or property; and after deducting all offsets, counterclaims, and deductions of any and every kind and character which should be allowed to the United States under any valid provision or provisions in said treaties and laws contained, or to which the United States may be otherwise entitled."

Under this act suit was instituted in the Court of Claims on behalf of the "Old Settlers," and resulted in a judgment against the United States for $224,972.68, "being a balance of the per capita fund provided by the fourth article of the treaty between the United States and the Western Cherokees, dated August 6, 1846, together with interest thereon from the 12th day of June, 1838, up to and until the entry of this decree, being the sum of $603,145.58, and likewise the sum of $4,179.26 for 3,343.41/100 acres of land in Arkansas ceded to the United States by article 4 of the treaty of May 6, 1828, amounting in the aggregate to the sum of $832,297.52." (27 Ct. of Cls., 1, 20, 56.)

On appeal to the Supreme Court of the United States this judg-
144 ment, on April 3, 1893, was modified as per the account stated by that court as follows:

The treaty fund		$5,600,000.00
Less:		
For 800,000 acres of land	$500,000.00	
For general fund	500,000.00	
For improvements	1,540,572.27	
For ferries	159,572.12	
For spoliations	264,894.09	
For debts, etc	60,000.00	
For removal of 16,967 Cherokees, at $20 each	339,140.00	
		3,364,178.48
Giving as the residuum to be divided		2,235,821.52
One-third due the Western Cherokees		745,273.84
Less payment September 22, 1851		532,896.90
Leaving a balance of		212,376.94

To which amount the court added the further sum of $4,179.26 for the Arkansas agency, and as so modified was affirmed, with interest on said balance of $212,376.94 at the rate of 5 per cent from June 12, 1838, up to and until the modification of the decree.

August 23, 1894, Congress appropriated the sum of $800,386.31 in settlement of this judgment, and of such amount the sum of $745,273.84 was distributed to the Western Cherokee as identified by the Drennen roll of 1852, if living, and to the descendants of those who had died. According to said roll the "Western Cherokee" then numbered 3,146 persons, who accordingly received the sum of $236.89 per capita, excluding interest.

XVIII.

By section 14 of the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1889, and for other purposes," approved March 2, 1889 (25 Stats. L., 1005), the President was authorized to appoint three commissioners to negotiate with the Indian tribes owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and he did appoint David H. Jerome, Alfred M. Wilson, and Warren G. Sayre such commissioners.

By virtue of the authority contained in an act of the Cherokee national council, approved November 16, 1891, Elias C. Boudinot, Joseph A. Scales, Roach Young, William Triplett, Thomas Smith, Joseph Smallwood, and George Downing were duly appointed commissioners—

"To meet and enter into negotiations with the above-named commission, appointed by the President of the United States, for the cession of the lands of the Cherokee Nation west of the 96th degree of west longitude, and for the final adjustment of all questions of interest between the United States and the Cherokee Nation which are now unsettled."

145 By said act of Congress it was made the duty of said commissioners appointed by the President to report all agreements resulting from such negotiations to the President, to be by him reported

to the Congress at its next session, and by the act of the Cherokee council it was made the duty of the commissioners on the part of the Cherokee Nation to report all their proceedings in full to the national council for its approval and ratification. (Ex. Doc. 56, 52d Cong., 1st sess., 17.)

At the outset of the negotiations between said commissioners for the purchase and sale of said lands, which were known as the "Cherokee Outlet," the commissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balances alleged to be due to them under various treaties, and particularly their contention that the so-called treaty fund had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian Territory, and demanded as "a condition precedent to any agreement for the sale of the land" that some adjustment of such contentions should be made.

On the 19th of December, 1891, after prolonged negotiations, the commissioners above named entered into articles of agreement, by Article I of which it was agreed that—

"The Cherokee Nation, by act duly passed, shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth (100°) degree of west longitude, on the north by the State of Kansas, on the east by the ninety-sixth (96°) degree west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation created or defined by Executive order, dated August 10, 1860, the tract of land embraced within the above boundaries containing eight million one hundred and forty-four thousand six hundred and eighty-two and ninety-one one-hundredths (8,144,682.91) acres, more or less."

By article 2 that—

"For and in consideration of the above cession and relinquishment the United States agrees:"

First. That it will remove from the limits of the Cherokee Nation as trespassers certain described persons.

Second. That a certain article of the antecedent treaty of July, 1866, should be abrogated and held for naught.

Third. That the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction in certain cases.

Fourth. That—

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right,
146 within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted

in, said accounting; and the Congress of the United States shall, at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting."

Fifth. That certain citizens of the Cherokee Nation should have the right to select lands as homesteads under certain conditions; and

Sixth. In addition to all of the foregoing enumerated considerations for the cession and relinquishment of title to the described lands, the United States shall pay to the Cherokee Nation, at such times and in such manner as the Cherokee national council shall determine, the sum of $8,595,736.12 in excess of the sum of $728,389.46, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River.

Said articles of agreement were accepted, ratified, and confirmed on the part of the Cherokee Nation by an act of the national council approved January 4, 1892, and were also accepted, ratified, and confirmed on the part of the United States by act of Congress of March 3, 1893 (27 Stat. L., 640).

Prior to the acceptance and ratification of said agreement on the part of the United States, as aforesaid, the commissioners on behalf of the United States, as required by the law under which they were appointed, had reported to the President the making of the articles of agreement aforesaid, and by way of explanation said:

"As to the conditions of the agreement, besides the relinquishment of title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.

"The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.

"Whatever that construction is, the Indian must abide by [it]. There is no appeal except to Congress. Without going specifically into details the Cherokees claim that upon a just accounting upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found due them. They also desire to include lands as well as money, but they were induced to eliminate 'lands' from the provision. With that eliminated the provision was agreed to, as set out. The Government has made the accounting, has kept the books, has con-
147 strued the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected." (Sen. Ex. Doc. 56, 52d Cong., 1st sess., pp. 11, 12.)

Gen. Thomas J. Morgan, Commissioner of Indian Affairs, in his report to the Secretary of the Interior on February 6, 1892, made the following explanation and comment on the fourth section of article 2, to wit:

"The fourth section of article 2 provides for an accounting between the United States and the Cherokee Nation. The work necessary to render this account will be very heavy, and much time will be necessary to properly prepare the same. On this provision of the agreement the commissioners say:

"The Government has made the accounting, has kept the books, has construed the treaties. If this has been done properly no harm can come from restating the account. If it has not been done properly no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for legal discharge of the old ones.

"This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it.

"In your reference of the matter to this office you said:

"'Particular attention is called to section 4 of article 2 of the agreement, with request for a full report as to what may be the state of the account between the United States and the Cherokees, if practicable, within a reasonable time; if not, your general conclusions.'

"In reply to this indorsement I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation, under the treaties therein specified and under the various appropriation acts to carry the same into effect, this account could be prepared by this office within a reasonable time, say, about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill for the ratification of the agreement herewith inclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose." (Senate Ex. Doc. No. 56, 52d Cong., 1st sess., p. 8.)

This report of the Commissioners was, on or about February 8, 1892, referred by the Secretary of the Interior to the Assistant Attorney-General for the Interior Department "for his consideration and report upon the legality of the contract, the sufficiency of the proposed bill, and his views upon the question(s) of law relating to the subject," and on or about February 25, 1892, said officer reported thereon, as appears
148 in said Senate Executive Document 56, Fifty-second Congress, first session, saying, among other things:

"The report and agreement were referred to the Commissioner of Indian Affairs, who, under date of February 6, 1892, reported favorably on the agreement, and transmitted with his report the draft of a bill to be submitted to Congress to ratify and carry out the provisions thereof. * * * The agreement contains two articles. The first relates to the cession and the second to the consideration therefor. * * *

"The considerations for said cession, as contained in article 2, are set forth under six subdivisions. * * *

"The fourth and next provision of article 2 of the agreement requires the United States to render to the Cherokee Nation a complete accounting of all money agreed to be paid to the Indians or which they may be entitled to under any treaty or act of Congress since 1817. And if said accounting is satisfactory Congress shall make the necessary appropriation to pay the same. But if the accounting is not satisfactory, then the Cherokees to have the right to institute suit in the Court of Claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

"I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting.

"The Commissioner of Indian Affairs asks for a special appropriation of $5,000 to enable him to make the accounting."

All of these reports were before the Congress when it accepted and ratified said articles of agreement by act of March 3, 1893 (27 Stat. L., 641), in the following language, to wit:

"Which said agreement is fully set forth in the message of the President of the United States, communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the 'Cherokee Outlet;' and said agreement is hereby ratified by the Congress of the United States, subject, however, to the Constitution and laws of the United States and to acts of Congress that have been or may be passed regulating trade and intercourse with the Indians, and subject also to certain amendments thereto, as follows: * * * (Amendments not important here.) * * *."

"And the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States; provided that the money hereby appropriated shall be immediately available, and the remaining sum of eight million three hundred thousand dollars, or so much thereof as is required to carry out the provisions of said agreement as amended and according to this act, to be payable in five equal instalments, commencing on the fourth day of March, eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of
149 four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated;"

* * * * * * *

"The acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement, as it is hereby proposed to be amended, and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands;"

* * * * * * *

"And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become, and be taken to be and treated as a part of the public domain."

XIX.

By said act of March 3, 1893, ratifying said agreement for the purchase of the "Cherokee Outlet" the Congress also provided as follows:

"The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement."

Thereafter James A. Slade and Joseph T. Bender were employed as experts under the provisions of said section of said act, and they made and rendered an account pursuant to the provisions of paragraph 4 of article 2 of the articles of agreement of December 19, 1891, as ratified and affirmed by said act of March 3, 1893. Said account was by the Secretary of the Interior referred to the Commissioner of Indian Affairs for examination and report, and the same having been examined and approved by said Commissioner, was by the latter returned to the Secretary of the Interior, who transmitted the same to the Cherokee Nation by delivering a copy thereof to R. F. Wyley, its properly constituted agent for receiving the same, and said account so made, rendered, and transmitted was accepted by the Cherokee Nation by an act of its national council approved December 1, 1894, and no suit was thereafter brought by the Cherokee Nation against the United States charging that said account was in anywise incorrect or unjust, but, on the contrary, the principal chief of the Cherokee Nation, as required by the act of its national council above referred to, did notify the Secretary of the Interior of the acceptance by said nation of said account as so stated by Messrs. Slade and Bender, and did request said Secretary of the Interior to notify the Congress of the United States of such acceptance, and on the 7th of January, 1895, the Secretary of the Interior reported the entire matter to the Congress in the following words:

"SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement
150 made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stats., 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of Cherokee national council accepting such accounting.

"The Speaker of the House of Representatives." (House Ex. Doc. No. 182, 53d Cong., 3d sess.)

XX.

The report and accounting made by said James A. Slade and Joseph T. Bender, referred to in the foregoing finding, is in the words and figures which appear in House Executive Document 182, Fifty-third Congress, third session. The conclusion thereof is as follows:

"The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement [a number of demands made by the Cherokee Nation were disallowed], and the result of the finding is submitted in the following schedule:

"Under the treaty of 1819:	
"Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the 'school' fund.....	$2,125.00
"(With interest from February 27, 1819, to date of payment.)	
"Under treaty of 1835:	
"Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund.....	1,111,284.70
"(With interest from June 12, 1838, to date of payment.)	
"Under treaty of 1866:	
"Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation.....	432.28
"(With interest from January 1, 1874, to date of payment.)	
"Under act of Congress, March 3, 1893:	
"Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund.....	20,406.25
"(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)"	

"Washington, D. C., April 28, 1894.

"(Signed) JAS. A. SLADE.
"JOS. T. BENDER."

XXI.

In arriving at the item of $1,111,284.70 the accountants among other tabulations made the following statement of the account:

"Figuring upon the basis stated in the ninth article of the treaty of 1846, and following the Auditor's and Comptroller's figures in the accounting of December 3, 1849, and eliminating from the charges made against the total fund of $6,647,067 the excess of payments over the amounts appropriated by the United States for that purpose, the true statement of the account is as follows:

151	For improvements.....		$1,540,572.27
	For ferries.....		159,572.12
For spoliations.....			264,894.09
For removal and subsistence, being the amount actually provided and expended for these purposes, and consisting of the following items.....		$335,105.91 1,047,067.00	1,382,172.91
For debts and claims upon the Cherokee Nation.....			101,348.31
For the additional quantity of land ceded to the nation.....			500,000.00
For amount invested as the general fund of the nation.....			500,880.00
For subsistence furnished after expiration of one year, under agreement that it should be charged to treaty fund.....			172,316.47
			4,621,756.17
For lands and possessions.....			5,000,000.00
For spoliations.....			264,894.09

Balance of $600,000 applicable to removal	$335,105.91
Appropriation of June 12, 1838	1,047,067.00
	6,647,067.00
From which deduct charges as above	4,621,756.17
Balance to be distributed per capita	2,025,310.83
Deduct amount actually distributed as already explained	914,026.13
Balance due	1,111,284.70

The sum of $914,026.13, actually distributed to the Eastern Cherokees in 1852, out of the above balance of $2,025,310.83, was appropriated as follows:

Amount found due by Treasury officials, under article 9, 1846, in the report of the Auditor and Comptroller of December 3, 1849	$627,603.95
Erroneous charge corrected by act of February 27, 1851	96,999.42
Erroneous charge account subsistence, corrected by Congress, September 30, 1850	189,151.24
	914,026.13

This amount of $914,026.13 was distributed solely to 14,098 Eastern Cherokees in the West and 2,133 Eastern Cherokees who remained East.

Interest on the above sum of $914,026.13 at 5 per cent from June 12, 1838, was also appropriated by Congress and distributed per capita to said Eastern Cherokees in the same payment. The balance to be distributed per capita according to the above report and which was not distributed, to wit, $1,111,284.70, is the sum of which the Eastern Cherokees complain they were deprived in the settlement of 1852; that while they received only $56.31 per capita, excluding interest, they should have received the further sum of $1,111,284.70, or a total of $2,025,310.83, as appears in the above account rendered as the true balance under article 9, making them a total per capita of $124.78.

The settlement made with the Old Settlers was as set forth in Finding XVIII.

XXII.

Neither the whole nor any portion of the various sums with interest found and stated by the concluding schedule of the so-called Slade-Bender report to be due to the Cherokee Nation under the treaties and acts of Congress therein referred to have been paid to the Cherokee Nation, or to any officer, agent, or other person acting in its behalf.

With the exception of the provision contained in the act of March 2, 1895, making appropriations for the legislative, executive, and
152 judicial expenses of the Government, directing the Attorney-General to review and report upon the conclusion of law disclosed in the account of Slade and Bender, and the passing of the provisions of the acts of July 1, 1902, and March 3, 1903, conferring jurisdiction upon the United States Court of Claims to hear and determine these causes, the Congress has taken no action whatever with respect to the said account of Slade and Bender or the amounts found due thereunder.

Acting under said direction of March 2, 1895, above referred to, the Attorney-General of the United States, on December 2, 1895, addressed a communication to the Congress wherein he advised that body of his disagreement with the conclusions reached by said Slade and Bender.

Said communication of the Attorney-General was, on December 2, 1895, by the Congress referred to the Committee on Indian Affairs and ordered to be printed, and the same appears in Senate Executive Document No. 16, Fifty-fourth Congress, first session.

XXIII.

The total acreage ceded by the Cherokee people to the United States at various times, as appears from Royce's History of the Cherokees (see Report of Ethnological Bureau, 1884), is as follows:

Date of treaty.	State where ceded lands are located.	Area in square miles.	Area in acres.
1721	South Carolina	2,623	1,678,720
November 24, 1755	do	8,635	5,526,400
October 14, 1768	Virginia	850	544,000
October 18, 1770	do	4,500	2,880,000
	West Virginia	4,300	2,752,000
	Tennessee	150	96,000
	Kentucky	250	160,000
1772	do	10,125	6,480,000
	West Virginia	437	279,680
	Virginia	345	220,800
June 1, 1773	Georgia	1,050	672,000
March 17, 1775	Kentucky	22,600	14,464,000
	Virginia	1,800	1,152,000
	Tennessee	2,650	1,696,000
May 20, 1777	South Carolina	2,051	1,312,640
July 20, 1777	North Carolina	4,414	2,824,960
	Tennessee	1,760	1,126,400
May 31, 1783	Georgia	1,650	1,056,000
November 28, 1785	North Carolina	500	352,000
	Tennessee	4,914	3,144,960
	Kentucky	917	586,880
July 2, 1791	Tennessee	3,435	2,198,400
	North Carolina	722	462,080
October 2, 1798	Tennessee	952	609,280
	North Carolina	587	375,680
October 24, 1804	Georgia	135	86,400
October 25, 1805	Kentucky	1,086	695,040
	Tennessee	7,032	4,500,480
October 27, 1805	Tennessee	1¼	80
January 7, 1806	do	5,269	3,372,160
	Alabama	1,602	1,025,280
March 22, 1816	South Carolina	148	94,720
September 14, 1816	Alabama	3,429	21,194,560
	Mississippi	4	2,560
July 8, 1817	Georgia	583	373,120
	Tennessee	435	278,400
February 27, 1819	Georgia	837	535,680
	Alabama	1,154	738,560
	Tennessee	2,408	1,541,120
	North Carolina	1,542	986,880
May 6, 1828	Arkansas	4,720	2,020,800
December 29, 1835	Tennessee	1,484	949,760
	Georgia	7,202	4,609,280
	Alabama	2,518	1,611,520
	North Carolina	1,112	711,680
July 19, 1866a	Kansas	1,928	1,233,920
Total		126,906	81,220,374

(H. R. Mis. Doc. 157, 49th Cong., 2d sess., vol. 10, p. 378.)

153 CONCLUSIONS OF LAW.

Upon the foregoing facts the court concludes as matters of law:

First that the United States is indebted to the Cherokee Nation in the following amounts, viz:

(1) The sum of $2,125, with interest at 5 per cent from February 27, 1819, to date of payment;

(2) The sum of $1,111,284.70, with interest at 5 per cent from June 12, 1838, to date of payment;

(3) The sum of $432.28, with interest at 5 per cent from January 1, 1874, to date of payment;

(4) The sum of $20,406.25, with interest at 5 per cent from July 1, 1893, to date of payment,

and is entitled to have judgment entered in its favor against the United States therefor.

Second. The proceeds of so much of said judgment as pertains to the items numbered 1, 3, and 4 equitably belong to the Cherokee Nation as a political or social body, and such proceeds, less any proportion thereof which the Cherokee Nation may have contracted to pay on account of counsel fees and other expenses of this litigation, should be paid or disposed of as follows, viz:

(*a*) The amount represented by item numbered three (3) for $432.28, and interest, should be paid to the treasurer of the Cherokee Nation, or to such other person or officer either of the nation or of the United States as may hereafter succeed to his duties;

(*b*) The amount represented by item numbered one (1), for $2,125 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the principal of the "Cherokee school fund," of which fund the United States are trustees;

(*c*) The amount represented by item numbered four (4), for $20,406.25 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the "Cherokee national fund," of which fund the United States are trustees;

(*d*) The amount represented by item numbered two (2), for $1,111,284.70 and interest, less counsel fees and expenses, equitably belongs to the Eastern and Western Cherokees who were parties either to the treaty of New Echota, proclaimed May 23, 1836, or the treaty of Washington, of August 6, 1846, as individuals, whether east or west of the Mississippi River, and should be paid to them or to their legal representatives by the Secretary of the Interior.

Third. Such counsel fees as may have been contracted to be paid by the Cherokee Nation in the manner prescribed by sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, and such other counsel fees and expenses as may be allowed by this court pursuant to the provisions of the act of March 3, 1903, set forth in Finding of Fact No. 1, should be paid to the parties entitled to receive the same by the Secretary of the Treasury upon the making of an appropriation by Congress for the payment of the judgment in this cause.

Fourth. The cost and expenses incident to ascertaining and identifying the individuals entitled to participate in the distribution of the bal-

ance of the amount represented by item numbered two (2), and the making of the distribution thereof, should be a charge upon such balance for distribution and should be deducted therefrom.

BY THE COURT.

154

THE CHEROKEE NATION
v.
THE UNITED STATES. } No. 23199.

THE EASTERN CHEROKEES
v.
THE UNITED STATES AND THE CHEROKEE NATION. } No. 23214.

THE EASTERN AND EMIGRANT CHEROKEES
v.
THE UNITED STATES. } No. 23212.

XIV.—Judgment entered May 18, 1905.

The above causes, on motion and by consent of the parties, having heretofore been consolidated for purposes both of hearing and judgment by appropriate order of this court, came on to be heard upon the pleadings, orders, and proofs, and were argued by Messrs. Charles Nagel, Edgar Smith, and Frederic D. McKenney, on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson, on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood, on behalf of certain individual claimants, styled Eastern and Emigrant Cherokees, and Mr. Assistant Attorney-General Pradt, on behalf of the United States; and the court being now sufficiently advised in the premises, it is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1. The sum of $2,125.00
With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.

Item 2. The sum of 1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.

Item 3. The sum of 432.20
With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.

Item 4. The sum of 20,406.25
With interest thereon from July 1, 1903, to date of payment.

155 the proceeds of said several items, however, to be paid and distributed as follows:

The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation, and shall be credited on the proper books of account to the principal of the "Cherokee school fund" now in the possession of the United States and held by them as trustees.

The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation, to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.

The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the "Cherokee national fund," now in the possession of the United States and held by them as trustees.

The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same, upon the making of an appropriation by Congress to pay this judgment.

The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States.

BY THE COURT.

156 *XV.—Application of the United States, defendants, for and allowance of an appeal.*

THE CHEROKEE NATION vs. THE UNITED STATES.	No. 23199.	Consolidated.
THE EASTERN AND EMIGRANT CHEROKEES vs. THE UNITED STATES AND THE CHEROKEE Nation.	No. 23212.	
THE EASTERN CHEROKEES vs. THE UNITED STATES AND THE CHEROKEE Nation.	No. 23214.	

From the judgment rendered in the above-entitled cause on the 18th day of May, 1905, in favor of claimant, The Cherokee Nation, the defendants, by their Attorney-General, on the 8th day of June, 1905, make application for, and give notice of, an appeal to the Supreme Court of the United States, and the said defendants pray that the said appeal be now allowed.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed June 8, 1905.

Indorsed: "The appeal of the defendants in this case is allowed.

"CHARLES C. NOTT, *Chief Justice.*"

June 10, 1905.

157 *XVI.—Application of the Eastern Cherokees for and allowance of an appeal.*

THE CHEROKEE NATION v. THE UNITED STATES.	No. 23199.	Consolidated.
THE EASTERN AND EMIGRANT CHEROKEES v. THE UNITED STATES AND THE CHEROKEE Nation.	No. 23212.	
THE EASTERN CHEROKEES v. THE UNITED STATES AND THE CHEROKEE Nation.	No. 23214.	

From the judgment rendered in the above-entitled cause on the 18th day of May, 1905, in favor of the Cherokee Nation, the Eastern Cherokees, by their attorneys, on the 9th day of June, 1905, make application

for, and give notice of, an appeal to the Supreme Court of the United States and pray that the said appeal be now allowed.

ROBERT L. OWEN.
ROBERT V. BELT.

Filed June 12, 1905.

The appeal of the Eastern Cherokees from the judgment in this case is allowed.

CHARLES C. NOTT, *Chief Justice.*

June 13, 1905.

158 *XVII.—Application of the Cherokee Nation, claimant, for and allowance of an appeal.*

THE CHEROKEE NATION v. THE UNITED STATES.	No. 23199.	Consolidated.
THE EASTERN CHEROKEES v. THE UNITED STATES.	No. 23214.	
THE EASTERN AND EMIGRANT CHEROKEES v. THE UNITED STATES.	No. 23212.	

Now comes the Cherokee Nation, claimant, by its attorneys of record, Finkelnburg, Nagel & Kirby and Edgar Smith, and pray an appeal to the Supreme Court of the United States from so much of the judgment entered in the above consolidated causes on May 18, 1905, as provides that the sum of $1,111,284.70, with interest thereon from June 12, 1836, to date of payment, less certain counsel fees and expenses, shall be paid to the Secretary of the Interior to be by him distributed in accordance with the further terms of said judgment.

FINKELNBURG, NAGEL AND KIRBY,
EDGAR SMITH,
Attorneys for the Cherokee Nation.

Filed July 3, 1905.

Order: "Let the above appeal of the Cherokee Nation be allowed.

"CHARLES C. NOTT,
"*Chief Justice.*"

July 3, 1905.

159 COURT OF CLAIMS.

THE CHEROKEE NATION *vs.* UNITED STATES.	23199.	Consolidated.
THE EASTERN CHEROKEES *vs.* UNITED STATES.	23214.	
THE EASTERN AND EMIGRANT CHEROKEES *vs.* UNITED STATES.	23212.	

I, John Randolph, Assistant Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above consolidated cases—of the opinion of the court and of the concurring and dissenting opinions, of the findings of fact and conclusions of law filed by the court, of the judgment of the court, of the respective applications of the defendants and claimants for appeal to the Supreme of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 13th day of July, 1905.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

160 (Indorsement on cover:) Court of Claims. File No., 19848. Term No., 346. The United States, appellant, vs. The Cherokee Nation. File No., 19849. Term No., 347. The Eastern Cherokees, appellants, vs. The Cherokee Nation. File No., 19850. Term No., 348. The Cherokee Nation, appellant, vs. The United States. Filed July 19th, 1905. File Nos., 19848, 19849, 19850. Office of the clerk, Supreme Court U. S. Received July 17, 1905.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 346.
THE UNITED STATES, APPELLANT,
vs.
THE CHEROKEE NATION.

No. 347.
THE EASTERN CHEROKEES, APPELLANTS,
vs.
THE CHEROKEE NATION.

No. 348.
THE CHEROKEE NATION, APPELLANT,
vs.
THE UNITED STATES.

We, the undersigned, attorneys in the above-entitled causes, agree that the attached intervening petition in suit No. 23199, of date December 22, 1903, may be filed in this appeal to complete the record.

L. A. PRADT,
Assistant Attorney-General.
F. D. MCKENNEY,
Atty. for Cherokee Nation.
ROBT. L. OWEN,
R. V. BELT,
W. H. ROBESON,
Attys. for the Eastern Cherokees.

In the United States Court of Claims.

THE CHEROKEE NATION, CLAIMANT,
vs.
THE UNITED STATES, DEFENDANT.
} No. 23199, genl. dock. 32.

Motion and petition to intervene and to consolidate suits Nos. 23199, 23212, and 23214.

Your petitioners, composed of about 4,500 Eastern and Emigrant Cherokees, more or less, pray this honorable court for leave to intervene in the above-entitled cause for the following reasons:

1. They are interested in the subject-matter of this suit and believe themselves to be entitled in proportion to their numbers to one-fifth or

more of the the $1,111,284.70 asked for, with interest thereon at 5% from June 12, 1838, the whole of which is being claimed by the plaintiff in the above cause.

2. Your petitioners filed in this court March 10, 1903, an independent suit, No. 23212, general docket, asking for this one-fifth interest, in which they would much prefer to be heard, but they did so without taking cognizance of the fact that the Cherokee Nation, so called, had already filed in this court, to wit, February 20, 1903, under act of July 1, 1902, the above-entitled suit which now, by reason of its date of filing, has precedence on the docket and may be taken up and considered to the detriment of your petitioners before their cause No. 23212 is reached, beside raising the question, to which they would not be able to
3 respond, of their right to file a suit at all, if, as they claim, the Cherokee Nation only named in "The agreement" has a right to bring suit; or if your petitioners are not an organized tribe or band within the contemplation of the act under which they have filed.

3. The Cherokee Nation, as such, has never recognized in the distribution of its lands, or funds, the Eastern Band of Cherokee Indians of North Carolina, so called (now only a corporation), and much less any of the Cherokees who have segregated themselves from said band either in said State or the adjoining States, many of whom are numbered among your petitioners, and many of whom have gone west to the Indian Territory, and have remained there for years and have failed to get recognition as citizens of the nation, often on account of jealousy of the number of allottees claiming enrollment, although the proofs of their Cherokee blood was duly filed with the "Commission."

4. Besides this, there was filed in this honorable court on March 14, 1903, a third suit, No. 23214, general docket, asking for the same fund, by The Eastern Cherokees vs. The United States and the Cherokee Nation, claiming under act of March 3, 1903, but representing only in part your petitioners, who, having failed to get their allotments, or any portion of the money distributed from the sale of the Cherokee strip, do not now wish to lose their share or pro rata of the second item of "the award" of money improperly taken from the five million fund, a fund created by the sale of their ancestral homes; whose parents were parties to the treaty of New Echota, and whose names are on the roll of 1835.

5. There are now, as stated, three suits filed in this honorable court, all claiming the same subject-matter, and the act of March 3, 1903, indicates that all suits of this nature shall be consolidated and tried
4 together, but this suit, No. 23199, was filed before this legislation was enacted, and the petitioners are not, therefore, bound by it, as the legislation is not retroactive, and they may not choose to be controlled by it.

Prayer.

Wherefore your petitioners pray not only that they may be allowed to intervene in suit No. 23199, in order to be insured a hearing, and that their rights may be protected, but that the three suits, Nos. 23199, 23212, and 23214, general docket, may be consolidated, so that their proofs and arguments already filed in No. 23212 may become available, and the rights of Eastern Cherokees as represented in suit No. 23214, not fully

comprehended in the other suits, may also be considered, and a joint hearing had of all the parties in interest.

Requests for findings of fact and briefs have been duly filed in the three suits.

BELVA A. LOCKWOOD,
Attorney for Eastern and Emigrant Cherokees.

5 CITY OF WASHINGTON, *District of Columbia, ss:*

Personally appeared before the undersigned, a notary public in and for the District of Columbia, Belva A. Lockwood, whose genuine signature is subscribed to the above petition, who, being sworn in due form of law, deposes and says: "I have read the above petition by me subscribed and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those stated on information and belief I believe to be true; and that I have authority under seal to sign the names of and to represent in this cause each and every one of the petitioners sought to be represented herein."

BELVA A. LOCKWOOD,
Attorney for Eastern and Emigrant Cherokees.

Sworn and subscribed before me, this 22d day of December, 1903.

[SEAL.] JAY G. WILSON,
Notary Public.

Filed Dec. 22, 1903.

A true copy of the original filed in the Court of Claims in case numbered 23199, on the 22d day of December, 1903.

Test this 20th day of October, A. D. 1905.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsed:) File Nos. 19848, &c. Supreme Court U. S. October term, 1905. Term Nos., 346, 347, and 348. The United States, appellant, v. The Cherokee Nation; The Eastern Cherokees, appellant, v. The Cherokee Nation; The Cherokee Nation, appellant, v. The United States. Stipulation of counsel and addition to record. Filed Nov. 10th, 1905.

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